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(27,307)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 552.

THE STANDARD FASHION COMPANY, PETITIONER,

vs.

MAGRANE HOUSTON COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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a United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1343.

THE STANDARD FASHION COMPANY, Plaintiff, Appellant,

v.

MAGRANE HOUSTON COMPANY, Defendant, Appellee.

Appeal from the District Court of the United States for the District of Massachusetts from Final Decree (Johnson, J.), March 13, 1918.

TRANSCRIPT OF RECORD.

Herbert Noble, James B. Sheehan, Robert G. Dodge, Storey, Thorndike, Palmer & Dodge, for Appellant.
James W. Sullivan, for Appellee.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1343.

THE STANDARD FASHION COMPANY, Plaintiff, Appellant,

v.

MAGRANE HOUSTON COMPANY, Defendant, Appellee.

Transcript of Record of District Court.

No. 815, Equity Docket.

THE STANDARD FASHION COMPANY, Plaintiff,

v.

MAGRANE HOUSTON COMPANY, Defendant.

The bill of complaint in this cause was filed in the clerk's office on the twenty-fifth day of July, A. D. 1917, and was duly entered at the June Term of this court, A. D. 1917, and is in the words and figures following:

Bill of Complaint.

[Filed July 25, 1917.]

1. The plaintiff is a corporation duly organized under the laws of the State of New York and is a citizen and resident of said State. The defendant is a corporation duly organized under the laws of the State of Massachusetts and is a citizen and resident of said State. The matter *is* controversy, as hereinafter set forth, exceeds exclusive of interest and costs the sum or value of $3,000.

2 2. The plaintiff is engaged in the business of manufacturing and selling patterns for all kinds of garments worn by women and children and in publishing periodicals and catalogues illustrating said patterns and containing pictures, plates, numbers and general descriptions thereof, all of which have a large and extensive sale and valuable reputation in the country at large and have been long on the market in the City of Boston, Massachusetts, and its vicinity. The handling, managing and sale of said patterns requires skill, knowledge of the trade and specially a leading position in the business of selling the dry-goods which are used in the manufacture of garments for which said patterns are made.

3. The defendant has for many years been engaged in the dry-goods business, so-called, in said Boston, having a large retail store at the corner of Washington Street and Temple Place in said city, where it has long conducted a successful business and for more than two years has maintained a special agency for the sale of the plaintiff's patterns as hereinafter more fully set forth. The defendant has become specially experienced in and has special facilities for the sale of such patterns and the distribution of periodicals and catalogues illustrating and describing the same.

4. On or about the twenty-fifth day of November, 1914, the plaintiff and the defendant entered into a contract, a copy of which is hereto annexed marked "A", whereby the plaintiff, among other things, granted to the defendant an agency for the sale of its patterns at the defendant's store aforesaid for a term of two years from the date of the contract and from term to term thereafter until the contract should be terminated in the manner therein provided, and the plaintiff agreed to supply the defendant with said patterns and certain advertising matter relating thereto and to exchange unsold patterns and at the termination of the agency to take back and credit all unsold patterns remaining on hand, all as more fully set forth in said contract; and among other things the defendant agreed to keep on hand a certain stock of the plaintiff's patterns, except during periods of exchange, in an amount of not less than $1,000, to permit the plaintiff to take account of said pattern stock whenever it desires, to pay proper attention to the
3 sale of said patterns, to conserve the best interests of the agency at all times, to re-order promptly all patterns as sold,

to give the department a prominent position on the ground floor in its store and to return to the plaintiff all patterns on hand at the termination of the contract; and the defendant expressly agreed not to sell or permit to be sold on its premises during the term of the contract any other make of patterns than those of the plaintiff. On the same day on which the said contract was executed and in accordance with its terms and requirements, the defendant signed a so-called detailed order, of which a copy is hereto annexed marked "B".

5. Thereafter the parties duly entered upon the performance of the said contract. The plaintiff supplied the defendant with patterns, advertising matter, periodicals, cabinets and signs with which to establish its pattern department and the defendant located said department on the ground floor of said store and proceeded with the performance of the conditions of the agreement on its part to be performed and established a very considerable trade in the patterns of the plaintiff, which was of great value to the plaintiff.

6. At the expiration of the original term of two years provided for in said contract neither party gave notice of the termination of the same, and the said contract, therefore, in accordance with its provisions was extended for a further term of two years and will continue in force until the expiration of three months after the end of said further term, to wit, until February 25, 1919.

7. The plaintiff has duly performed all the conditions of the said contract upon its part to be performed and has been at all times and is now ready, willing and able to perform the same until the expiration of the term of said contract and has so informed the defendant.

8. The defendant performed the conditions of said contract on its part to be performed until the ninth day of July, 1917, on or about which date it without right ceased to sell or to make efforts to sell the plaintiff's patterns, abolished the department for the conducting of such sales and installed in place thereof a department for the sale of the patterns of The McCall Company, one of the
4 plaintiff's competitors in business; and since said date the defendant has not performed any of the conditions of said contract on its part to be performed, but, on the contrary, has sold and permitted to be sold on the premises described in said contract a make of patterns other than those of the plaintiff, to wit, the McCall patterns, manufactured by the said The McCall Company; and the defendant has not paid proper attention to the sale of Standard patterns, but, on the contrary, has paid attention to the sale of said McCall patterns, and the defendant has not conserved the best interests of the agency for Standard patterns, but, on the contrary, has conserved the best interests of The McCall Company, plaintiff's competitor, by the sale of said McCall patterns and by the distribution of large quantities of McCall fashion sheets and has diverted the trade in the plaintiff's patterns among the defendant's customers to the said The McCall Company. The plaintiff has duly demanded of the defendant that it withdraw the said McCall patterns from sale on its said premises and that it proceed with the performance

of the said contract, but the defendant has failed and refused so to do; and the plaintiff is informed and believes and therefore alleges that unless restrained by order of this court the defendant intends to continue the sale of said McCall patterns and to continue the aforesaid breaches of said contract.

9. The said contract was entered into by the plaintiff, as the defendant well knew, with the object of securing to the plaintiff the great advantage which would accrue to it from having its patterns sold exclusively in the store of the defendant on account of the defendant's peculiar fitness and special advantages for the sale of such goods and to obtain for the plaintiff the prestige and renown that would accrue to it from the exclusive sale of its patterns in the said store of the defendant. The purpose of said contract, although in form it provides for the sale of patterns by the plaintiff to the defendant, is in fact to sell the plaintiff's patterns to the public through the defendant and not to sell said patterns to the defendant, as all patterns which are not sold by the defendant to the public must be returned by the defendant to the plaintiff; and all of the provisions of the said contract have for their object the increase in the number of patterns sold or to be sold through the defendant to the public and the decrease in the number of patterns to be returned by the defendant to the plaintiff. It is essential to the successful management in any store of a department for the sale of patterns that the agent shall handle the patterns of only one manufacturer and that competing patterns shall not be sold in the same store, and it has been established by experience and is well recognized in the trade that the sale of competing patterns in the same store results in loss to all parties concerned and is a disadvantage to the public.

10. The store of the defendant mentioned in said contract is located in the center of the retail dry goods district in the City of Boston. Within a radius of seven hundred and fifty feet from the defendant's said store are located three other agencies for the sale of the patterns of the plaintiff's said competitor The McCall Company, while within said radius the plaintiff has but one agency for the sale of its patterns; and within said radius all of plaintiff's competitors have one or more agencies for the sale of their patterns. In the entire metropolitan district of Boston, including the city proper and its suburbs, the plaintiff has but five agencies for the sale of its patterns, while in the same district its competitors have over one hundred such agencies. The plaintiff has for thirty years conducted the sale of its patterns to the public through agencies established under contracts identical or similar in form to that between the plaintiff and the defendant, and said contracts have not lessened competition or tended to create a monopoly in the pattern business; and the said contract between the plaintiff and the defendant and the performance of the terms thereof have had and will have no tendency to lessen competition or to create such a monopoly.

11. If the defendant be suffered to continue to violate the said contract, the plaintiff will suffer irreparable injury in its business and

in the reputation of its goods and particularly in the diversion to its competitor The McCall Company of a large amount of trade to which it is rightfully entitled and which has already been established.

6 There is no other store in the retail dry goods district of Boston where the plaintiff can establish an agency as valuable to it as the agency which it is entitled to have in the defendant's store under the said contract. It is impossible to estimate in money the amount of damages suffered by the plaintiff by virtue of the defendant's breach of contract as aforesaid and the plaintiff therefore has no adequate remedy at law.

Wherefore the plaintiff prays:

1. That the defendant and its agents and servants may be enjoined temporarily until hearing and permanently thereafter during the term of said contract and until February 25, 1919, from advertising, selling or distributing the patterns, periodicals, catalogues and other literature or printed matter of the said The McCall Company or any pattern manufacturer other than the plaintiff, and from using its store, business, agents, clerks, apparatus or connections to further or advance the interests of the said The McCall Company or any other pattern manufacturer than the plaintiff and from permitting to be sold at its said store during the term of said contract and until the aforesaid date any make of patterns other than those of the plaintiff.

2. That the plaintiff may be awarded such damages as may be ascertainable.

3. That the plaintiff may have such further or other relief as the nature of the case may require.

ROBERT G. DODGE,
HERBERT NOBLE,
New York;
JAMES B. SHEEHAN,
New York,
Solicitors for the Plaintiff.

STOREY, THORNDIKE, PALMER & DODGE,
Attorneys.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

Walter H. Marsh, being duly sworn, deposes and says that he resides in Hudson, New Hampshire, and is manager of the Boston office of the Standard Fashion Company, the above-named plaintiff,

7 and is familiar with its business; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

WALTER H. MARSH.

Subscribed and sworn to before me this twenty-fifth day of July, 1917.

HAROLD S. DAVIS,
Justice of the Peace.

[MEMO.—Copy of contract, marked "A" and detailed order, marked "B" are here omitted, as they later appear of record as Exhibits 7 and 8.]

At the same term, to wit, August 14, 1917, the following Answer was filed:

Answer.

[Filed August 14, 1917.]

Answer of the Defendant, Magrane Houston Company, to the Plaintiff's Bill of Complaint Herein.

1. The defendant has no certain knowledge that the plaintiff is a corporation duly organized under the laws of the State of New York and is a citizen and resident of said State, and requires the plaintiff to prove the same. The defendant admits it is a corporation duly organized under the laws of the State of Massachusetts and is a citizen and resident thereof. The defendant denies that the matter in controversy exceeds the sum or value of $3,000.

2. The defendant admits all the allegations of paragraph 2 of the plaintiff's bill of complaint except the allegation "all of which have a large and extensive sale and valuable reputation in the country", as to which allegation the defendant says it has no definite knowledge and requires the plaintiff to prove the same if material.

3. The defendant admits the allegation of paragraph 3 relative to its conducting a business, except the allegation that it had maintained a special agency for the sale of the plaintiff's patterns, as to which allegation it says the contract hereinafter referred to is decisive. The defendant denies the allegation that it has be-
8 come specially experienced in or has special facilities for the sale and distribution of patterns and catalogues.

4. The defendant admits that it entered into a contract, a copy of which is annexed to the plaintiff's bill of complaint and marked "A", and says further that it admits the other allegations of paragraph 4 so far as they are repetitions of what is contained in said contract, and denies them so far as they are not declaratory of the terms of said contract.

5. The defendant denies that it established a very considerable trade in the patterns of the plaintiff, which were of great value to the plaintiff, and admits all the other allegations of paragraph 5 of the plaintiff's bill.

6. The defendant denies the allegations of paragraph 6 of the plaintiff's bill.

7. The defendant denies the allegations of paragraph 7 of the plaintiff's bill.

8. The defendant admits the allegations of paragraph 8 of the plaintiff's bill, except that its action was without right and except that its action will constitute a breach of contract if continued.

9. The defendant denies all the allegations of paragraph 9 of the plaintiff's bill.

10. The defendant admits the allegation as to the location of its store contained in paragraph 10 of the plaintiff's bill. As to the succeeding allegations relative to the location and number of agencies of the plaintiff and its competitors, the defendant has no accurate knowledge, and requires the plaintiff to prove the same if material. The defendant denies all the succeeding allegations of paragraph 10 of the plaintiff's bill.

11. The defendant denies all the allegations of paragraph 11 of the plaintiff's bill, except the allegation relative to the impossibility of estimating alleged damages suffered by the plaintiff, and as to this allegation says that if the plaintiff had suffered damages the same could be estimated, but the plaintiff has not suffered any damage by reason of any wrongful conduct of this defendant.

12. And further answering the defendant says that the plaintiff and the defendant, at the time of their entering into the con-
9 tract, a copy of which is annexed to the plaintiff's bill herein, understood and construed the said contract as a contract for the term of two years from its date, and for such longer time as either party should fail to give notice of a desire to terminate the same; that at the time of the entering into the said contract the plaintiff had no other agency for the sale of its product among the immediate competitors of the defendant; that early in the year 1917 the plaintiff installed its product and opened an agency in the store of the R. H. White Company, a direct competitor of the defendant whose store is but a short distance from the defendant's, which agency the plaintiff still maintains.

And the defendant says that thereafter, to wit, on April 7, 1917, it gave the plaintiff notice in writing that it had decided to terminate the sale of the plaintiff's product in its store, a copy of which notice is as follows:

"April 7, 1917.

The Standard Fashion Co., Van Dam Street, New York, N. Y.

GENTLEMEN:

The Magrane Houston Co. of Boston, Mass., hereby notify you that they have decided to terminate the sale of your Standard Fashion Patterns in their store in three (3) months from the above date,

which is in conformity with the contract entered into between your company and the Magrane Houston Company, dated November 25, 1914.

Yours very truly,

____ ____,
President."

PBM/MHM.

That thereafter the defendant continued to do all things required of it by its contract with the plaintiff until the time provided for in said notice had expired, to wit, on July 9, 1917, when in accordance with said notice it ceased to do business with the plaintiff. The defendant further says that no irreparable injury or damages of any sort will ensue to the plaintiff by reason of the defendant discontinuing the sale of the plaintiff's product, and that the plaintiff's product can be obtained as easily and conveniently now in the same neighborhood with the defendant as before the defendant discontinued its sale of the plaintiff's goods.

And the defendant further says that neither it nor its officers intended to enter into any contract requiring any definite term beyond two years for its performance, and that the construction of the said contract set out in paragraph 6 of the plaintiff's bill is a forced and unusual construction thereof and that the said contract should be construed as binding the defendant for two years and from time to time thereafter until notice of its termination was given. The defendant further says that the plaintiff is a combination in restraint of trade, and that it is seeking an injunction against the defendant for the purpose of preventing competition and to establishing monopoly.

The defendant further says that the contract herein sued upon is not one of any great value to the plaintiff, and whatever damage the plaintiff has or will suffer from any breach of it which it may be able to prove will be amply and adequately compensated for by the payment of money damages to the plaintiff, and that the plaintiff by reason of its opening another agency in competition with the defendant, and because of the fact that its aim in securing an injunction is not to enforce a contract with the defendant, but to prevent competition by injuring a competitor of the plaintiff's, is not entitled to equitable relief, but has a plain, adequate and complete remedy at law.

MAGRANE HOUSTON COMPANY,
By JAMES W. SULLIVAN,
Its Attorney.

This cause was thence continued to the September Term, A. D. 1917, when on the twenty-seventh and twenty-eight days of November said cause came on to be heard on the pleadings and evidence and was fully heard by the court, the Honorable Charles F. Johnson, Circuit Judge, duly assigned to hold said District Court, sitting.

This cause was thence continued under advisement to the present

December Term, A. D. 1917, when, to wit, March 9, 1918, an opinion of the court is announced.

On the thirteenth day of March, A. D. 1918, the following Final Decree is entered:

11 *Final Decree.*

March 13, 1918.

JOHNSON, *J.*:

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, namely: That the bill of complaint herein may be dismissed with costs to the defendant in the sum of $52.88.

By the Court.

JOHN E. GILMAN, JR.,
Deputy Clerk.

From the foregoing final decree the plaintiff claims an appeal to the United States Circuit Court of Appeals for the First Circuit, and bond being waived said appeal is allowed accordingly.

Opinion of the Court.

March 9, 1918.

JOHNSON, *J.*:

November 25, 1914, the plaintiff entered into a contract with the defendant, containing among others the following provisions:

"The first party hereof grants to second party an agency for the sale of Standard patterns for their store in the City of Boston, State of Massachusetts, for a term of two years from date hereof, and from term to term thereafter until this agreement is terminated, as hereinafter provided, and agreed to sell and deliver f. o. b. New York or at its branch office in Boston, Mass., to second party, Standard patterns, at a discount of fifty percent from retail prices, and advertising matter at the prices and on the conditions named on the reverse side hereof; also such other publications as may be issued by first party at regular agents' rates; to allow second party to return discarded patterns semi-annually between January 15th and February 15th, and July 15th and August 15th, in exchange at nine-tenths cost, for other patterns to be shipped at the time of return or thereafter; but not in exchange for other goods than patterns. Patterns returned for exchange must have been purchased by second party from first party direct, and must be delivered in good order to first party at its general office in New York.

12 In consideration of the above the second party agreed to purchase a certain number of standard fashion sheets and handy catalogues per annum and to pay transportation charges on

same, and on all goods ordered or returned, and to purchase and keep on hand at all times, except during periods of exchange, one thousand dollars ($1,000) value in Standard patterns, at the net invoice prices, and to pay first party for the first order of pattern stock five hundred dollars ($500) thirty (30) days after shipment of the same, it being agreed that the balance of the purchase price, five hundred dollars ($500), should remain unpaid as a standing credit during the continuance of the agreement and become due and payable at its termination, upon which sum the second party agreed to pay interest at the rate of three per cent (3%) per annum on January 15th of each year, and to pay for all other purchases on or before the fifteenth day of the month succeeding the date of shipment.

The second party also agreed:

"not to sell or permit to be sold on its premises during the term of the contract any other make of patterns, and not to sell Standard patterns except at label prices."

The contract contained this provision in regard to its termination:

"Either party desirous of terminating this agreement must give the other party three months' notice in writing within thirty days after the expiration of any contract period, as above specified, the agency to continue regularly during such three months."

No notice of its desire to terminate the contract was given by the defendant to the plaintiff within thirty days after the expiration of the first period of two years after date of the contract; but on April 7, 1917, it gave to the plaintiff notice in writing of its decision to terminate the sale of Standard patterns in three months from the date of the notice, and about the first of July, 1917, discontinued the sale of the Standard patterns and placed on sale in its store patterns made by The McCall Company.

13 In its bill the plaintiff prays that the defendant may be enjoined until February 25, 1919, the earliest date at which it claims the contract can be terminated,—

"from advertising, selling or distributing the patterns, periodicals, catalogues and other literature or printed matter of said McCall Company or any pattern manufacturer other than the plaintiff, and from using its store, business, agents, clerks, parties or connections to further advance the interests of the said McCall Company or any other pattern manufacturer other than the plaintiff, and from permitting to be sold at said store during the term of said contract, and until the aforesaid date, any make of patterns other than those of the plaintiff."

The plaintiff also asks to be awarded "such damages as may be ascertainable."

The defendant claims:

1. That the contract was terminated on July 7, 1917, by the notice given by it on April 7, 1917.

2. That the contract is one for sale and that, because it contains the negative covenant

"not to sell or permit to be sold on the premises of second party during the term of the contract any other make of patterns."

it is in violation of Act, October 15, 1914, Chapter 323, Section 3, 38 St. 731, known as the Clayton Act.

I find that the defendant did not give notice of its desire to terminate the contract in accordance with its provisions, and that it would continue in force until terminated as therein provided, unless it can be successfully attacked by the defendant as unlawful under Section 3 of the Clayton Act, which is as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof
14 shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

If an agency only were created by the contract in question it is clear that the provisions of this act would not apply, because by its terms it is made applicable only to leases, sales or contracts for sale. Although the plaintiff, by the terms of the contract, grants to the defendant and agency for the sale of Standard patterns, the court will search beneath the language employed to discover the real nature of the contract and will place its own construction upon it without reference to its characterization by the parties themselves.

The plaintiff in fact agreed to sell and deliver to the defendant

"Standard patterns at a discount of fifty per cent from retail prices and advertising matter at the prices and on the conditions named * * * also such other publications as may be issued by first party at regular agents' rates."

All transportation charges and expenses of sale were to be paid by the defendant. No accounting by the defendant to the plaintiff was required. While the defendant had the right to return discarded patterns between January 15th and February 15th, and between July 15th and August 15th in each year, and could receive in exchange nine-tenths of their cost in other patterns, there is nothing in the contract to compel it to make the exchange, and patterns which are re-

turned for exchange must have been purchased by the second party from the first party direct.

One-half the contract price to be paid for the first order of patterns was entered upon the books of the plaintiff company as an obligation which the defendant was to pay at the termination of the contract, and upon which it agreed to pay interest yearly. No condition was to be performed by the defendant before the title to the patterns delivered would vest in it, and the fact that the defendant could return discarded or unsold patterns in no way prevented the title to the patterns from vesting absolutely in the defendant. While the defendant agreed to return unsold patterns at the termi-
15 nation of the contract, yet this right of return was evidently inserted for its benefit rather than to insure the return of patterns to the plaintiff, for the contract provides:

"That neglect to return the pattern stock within two weeks after expiration of three months' notice shall relieve first party from all obligation to redeem the same."

That it was the intent and understanding of the parties to the contract that this return of unsold patterns constituted a repurchase by the plaintiff, plainly appears from the typewritten section which appears upon the back of the contract, by which it is provided that in case the premises of the defendant company or a substantial part of the same should be sold, the defendant company should have the privilege of terminating the contract, and "may" then deliver its stock of patterns to the plaintiff "for repurchase under the repurchase clause of this contract."

It will be noted that the defendant is not compelled by this provision to return its unsold stock, but that it "may deliver" the same to the plaintiff " for repurchase." The purchase of the whole contract is plainly to sell patterns at a reduced rate to the defendant on the condition that it will resell at the retail prices fixed by the plaintiff, and also refrain from selling the goods of any other pattern manufacturer. The credit extended for one-half the purchase price of the original order for patterns is intended to serve the purpose of holding the defendant to its contract.

The reports of the judiciary committees of the House of Representatives and the Senate accompanying the Clayton Act were introduced in evidence for the purpose of showing that it was not the intent of Congress to include "exclusive agencies" within the scope of the act. They contain this statement relative to the purpose of the act:

"It not only does not prohibit or forbid exclusive agencies, but on the contrary it in no way whatsoever relates to agencies, properly so termed."

It will be noticed that the committees were very careful to state that only "agencies, properly so termed," are excluded from the provisions of the act.

16 I do not think the contract establishes an agency, "properly so termed," although it is made to assume this aspect in some of its features, but that it is a contract for sale; and in this view I find support in the recent opinion of the Supreme Court in Straus et al. v. Victor Talking Machine Company, 243 U. S. 490, and of Circuit Judge Knappen in Ford Motor Co. v. Union Motor Sales Co. et al., 244 Fed. 156.

Counsel for the plaintiff relies upon Wilcox & Gibbs Co. v. Ewing, 141 U. S. 627, as decisive of the question whether the contract was one of agency or one for sale; but admitting under the authority of this case that the defendant was created an agent for certain purposes. It is also nevertheless true that the contract contained an agreement for an absolute sale of patterns and the plaintiff's publications to the defendant as its agent.

If the contract is one for sale, is it unlawful under the Clayton Act because its effect

"may be to substantially lessen competition or tend to create a monopoly?"

Neither the Supreme Court nor any other court of last resort has yet passed upon Section 3 of the Clayton Act.

The cases from State courts that have been cited by the plaintiff were all decided before the passage of the Clayton Act and all dealt with the construction of a State statute, and therefore afford no assistance in the construction of a statute which is declared to be supplemental to the Sherman Act, after a construction had been placed by the Supreme Court upon that act by which the restraint of trade prohibited by it was declared to be an unreasonable restraint.

In the Great Atlantic & Pacific Tea Company v. Cream of Wheat Company, 227 Fed. 46, the court had under consideration Section 2 of the Clayton Act, which deals with discriminations between different purchasers in the sales of commodities and makes such discriminations unlawful

"where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

17 The last clause of the section, however, provides:—

"That nothing herein contained shall prevent persons engaged in selling goods * * * from selecting their own customers in bona fide transactions and not in restraint of trade."

The court there held that it was not unlawful for the Cream of Wheat Company to refuse to sell its product to retailers and confine its sales exclusively to wholesalers; and held that

"Neither the Sherman Act nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular."

and found it unnecessary to go into a consideration of the Clayton Act, which was discussed by District Judge Hough when the case was before him, and whose opinion in 224 Fed. 566 is cited upon the brief of counsel for the plaintiff.

In Motion Picture Patents Company v. Universal Film Manufacturing Company 235 Fed. 398, it was claimed in the Circuit Court that the contract there under consideration was unlawful because in violation of Section 3 of the Clayton Act; and Judge Hand said:

"If the prohibitions of the Clayton Act mean anything at all this case falls within them and the restrictions as to the use of films other than complainants' with the projecting machines are therefore void.

"Indeed the report of the Judiciary Committee of the House concerning the Clayton Act shows that its purpose is to reach the film monopoly."

When the case reached the Supreme Court, however, it was decided upon other grounds, the court stating its conclusion as follows (243 U. S., 502, 517):—

"Our conclusion renders it unnecessary to make the application of this Statute to the case at Bar which the Circuit Court of Appeals made of it; but it must be accepted by us as a most persuasive expression of the policy of our country with respect to the question before us."

In the dissenting opinion of Mr. Justice Holmes he also "leaves on one side the question of the effect of the Clayton Act."

In Coca Cola Company v. J. G. Butler & Sons, 229 Fed.
18 224, Judge Trieber found that the refusal of the Coca Cola Company to sell its syrup for bottling to other than its licensed bottlers and permit such parties to use its trademark in connection with the bottled product was not a violation of the Clayton Act, in view of the possibility of adulteration and the hardship to the manufacturer in maintaining such supervision over the bottling as it deemed necessary if required to sell to every intending purchaser.

In Pictorial Review Company v. Curtis Publishing Company, decided June 23, 1917, Judge Hand found that the Curtis Publishing Company had established a system for the promotion of the sale of its publications by forming a "league of Curtis salesmen," and that a restriction in its contract with district agents or wholesalers of the defendant's publications that they should not sell to the Curtis newsboys publications other than those of the defendant without first obtaining the defendant's approval, was not in violation of the Clayton Act; but his decision was placed upon the ground that the league of newsboys had been formed by the Curtis Company through its "ingenuity, labor and capital," and that the complainant was attempting to secure a preliminary injunction in order that it might avail itself of the plaintiff's system for the sale of its own publication, and that in making this attempt the complainant is itself engaging in unfair trade. He intimates in the following language, however, what his opinion might be if nothing but a sale were involved:—

"If nothing but a sale were involved, I might support plaintiff's contention that defendant has violated the Clayton Act by preventing these wholesale dealers from selling the Pictorial Review through sub-dealers and boys."

In United States v. United Shoe Machinery Company, 234 Fed. 127, 150, District Judge Trieber, after having quoted part of the opinion of the Supreme Court in the Standard Oil Company case, discusses the Clayton Act as follows:—

"On the other hand, the Act now under consideration, instead of using the generic words of the Sherman Act, in plain and unequivocal language states what acts shall be unlawful, if they 'substantially lessen competition or tend to create a monopoly.'
19 This being the case the presumption is, not that Congress intended that the construction of the Sherman Act should control, but, on the contrary, that it should not control. Had Congress intended that the construction placed upon the Sherman Anti-Trust Act in those cases should apply to the Clayton Act, it would have used the same or like generic words, instead of defining what acts shall be unlawful, if the natural result of such acts tends to substantially lessen competition or create a monopoly in any line of commerce." * * *

"Evidently Congress was not satisfied to only prohibit actual lessening of competition, or monopolizing, but to make it unlawful for any person to do those acts, which may put it in his power to do so."

The Clayton Act is entitled: "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes."

The report of the Senate committee of the judiciary upon the bill contains the following statement of its purposes:

"Broadly stated the bill in its treatment of unlawful restraints and monopolies seeks to prohibit and make unlawful certain trade practices, which as a rule singly and in themselves are not covered by the Act of July 2, 1890, or other existing Anti-Trust Acts; and thus by making these practices illegal, to arrest the creation of trusts, conspiracies and monopolies in their incipiency and before consummation."

While the Clayton Act reaffirms the general terms of the Sherman Act as construed by the United States Supreme Court in the Standard Oil Company and American Tobacco Company cases, it goes further and deals in specific terms with certain acts and practices which are declared by it to be unlawful if their effect may be "to substantially lessen competition or tend to create a monopoly."

The court is not to inquire into the wisdom of such legislation, and in Standard Manufacturing Company v. United States, 226 U. S. 20, 49, its duty is clearly stated by Mr. Justice McKenna:

"The law is its own measure of right and wrong, and what it permits or forbids and the judgment of the courts cannot be set up

against it in a supposed accommodation of its policy with the good intentions of parties, and it may be of some good results."

20 I am satisfied with the reasoning of Judge Trieber that Congress, with the full knowledge of the construction which had been placed upon the Sherman Act by the Supreme Court, did not intend that the same construction should be placed upon the specific terms of the Clayton Act; for it chose to define the lessening of competition which it declared to be unlawful, and to do this used the word "substantially" to make it apparent that a real, as opposed to an imaginary or fanciful lessening of competition, was intended.

Doubtless a substantial lessening of competition would amount to an unreasonable restraint of trade; but I do not think it is the duty of the court to find this before it can pronounce a contract unlawful, the effect of which it has found may be to "substantially lessen competition." The reports of the committees of both houses of Congress, as well as the legislative history of the bill, show the intent of Congress to protect the public from practices which it believed to be inimical to the public good by preventing these practices from being put in operation.

I think, therefore, it is the duty of the court to determine whether or not the contract has provided means for a real or substantial lessening of competition, irrespective of what use has been or is being made of these means.

By the use of the word "may" the intent is manifest to deal with the potential evil which a contract may contain, and to make the attempt to substantially lessen competition unlawful.

The contract must be considered as part of a widely extended system and a conclusion reached as to the legality of the system. There are in the United States and Canada about fifty-two thousand (52,000) so-called pattern agencies, and of these the plaintiff and two other companies allied with it through a common holding company control about twenty thousand (20,000), with all of whom a contract like the one we are considering is in force.

The contract by its terms destroys all competition in the sale of patterns and establishes a complete monopoly in the territory which it covers: a large retail dry goods store at the corner of Temple Place and Washington Street, in the centre of the dry goods district of a large city.

21 The plaintiff has made a contract containing a like negative covenant with R. H. White Company, whose store is nearly opposite the defendant's store upon Washington Street, both of which stores the plaintiff claims are very desirable locations for the sale of its patterns, because goods are sold there from the piece for the manufacture of women's and children's clothing by use of patterns.

If the plaintiff could make a contract like the one under consideration with all the proprietors of retail dry goods stores in this district, it would have a complete monopoly of the sale of patterns in it, and there is nothing in the contract to prevent it doing this, or even covering the whole State of Massachusetts or the whole country. If there were but one dry goods store in a village and the plaintiff

could make this contract with the proprietor of that store, it would secure a practical monopoly of the pattern business in that village.

I am of the opinion that the negative covenant in the contract is prohibited by the Clayton Act, and therefore that the bill should be dismissed with costs to the defendant.

A decree in accordance with the above may be submitted.

Plaintiff's Petition for Appeal.

[Filed March 13, 1918.]

The above-named plaintiff, Standard Fashion Company, conceiving itself aggrieved by the final decree of this court entered on March 13, 1918, in the above-entitled proceeding, does hereby appeal from said decree to the United States Circuit Court of Appeals for the First Circuit, and it prays that this its appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the said Circuit Court of Appeals for the First Circuit.

STANDARD FASHION COMPANY,
By STOREY, THORNDIKE, PALMER & DODGE,
Its Attorneys.

22 Boston, March 13, 1918.

And now, to wit, on March 13, 1918, it is ordered that the appeal be allowed as prayed for.

CHARLES F. JOHNSON,
U. S. Circuit Judge.

Bond on appeal waived.

MAGRANE HOUSTON COMPANY,
By JAMES W. SULLIVAN,
Its Attorney.

Plaintiff's Assignment of Errors.

[Filed March 13, 1918.]

Now comes the above-named plaintiff, Standard Fashion Company, and makes and files with its petition for appeal from the final decree in this cause the following assignment of errors:

1. The court erred in ruling that the plaintiff's bill should be dismissed.

2. The court erred in ruling that the negative covenant in the contract which the plaintiff by this bill seeks to enforce is prohibited by the Clayton Act.

3. The court erred in finding and ruling that "the purpose of the whole contract is plainly to sell patterns at a reduced rate to the defendant on the condition that it will resell at the retail prices fixed

by the plaintiff, and also refrain from selling the goods of any other pattern manufacturer".

4. The court erred in finding and ruling that "the credit extended for one-half the purchase price of the original order for patterns is intended to serve the purpose of holding the defendant to its contract".

5. The court erred in ruling that the contract did not establish an agency properly so termed.

6. The court erred in ruling that even if the defendant was created by the contract an agent for certain purposes, nevertheless as the contract contained an agreement for an absolute sale of patterns and publications to the defendant as the plaintiff's agent the contract should be treated as one of sale.

7. The court erred in ruling that the cases from State courts
23 dealing with State anti-monopoly statutes afford no assistance in construing the Clayton Act.

8. The court erred in ruling that Congress did not intend that the same construction should be placed upon the terms of the Clayton Act as had been placed by the Supreme Court upon the similar terms of the Sherman Act.

9. The court erred in ruling that "it is the duty of the court to determine whether or not the contract has provided means of a real or substantial lessening of competition, irrespective of what use has been or is being made of these means".

10. The court erred in ruling that the contract in question must be considered as part of a widely extended system and a conclusion reached as to the legality of the system.

11. The court erred in finding and ruling that the contract by its terms destroys all competition in the sale of patterns and establishes a complete monopoly in the territory which it covers.

STANDARD FASHION COMPANY,
By Its Attorneys,
STOREY, THORNDIKE, PALMER & DODGE.

Stipulation as to Use of Exhibits.

[Filed March 13, 1918.]

It is hereby agreed that the original exhibits may be used at the arguments in the Circuit Court of Appeals and may be submitted to the court.

STOREY, THORNDIKE, PALMER & DODGE,
Attorneys for Plaintiff.

JAMES W. SULLIVAN,
Attorney for Defendant.

24 *Stipulation as to Record.*

[Filed March 13, 1918.]

It is agreed that the testimony to be included in the transcript of record shall be reproduced in the exact words of the witnesses.

STOREY, THORNDIKE, PALMER & DODGE,
Attorneys for Plaintiff.

JAMES W. SULLIVAN,
Attorney for Defendant.

March 13, 1918.

JOHNSON, *J.*:

Ordered the testimony to be included in transcript of record may be reproduced in the exact words of the witnesses, pursuant to stipulation.

Attest:
JOHN E. GILMAN, JR.,
Deputy Clerk.

Præcipe.

[Filed March 13, 1918.]

Bill of complaint.
Answer.
Opinion of Johnson, J.
Final decree.
Petition for appeal and waiver of bond.
Assignment of errors.
Testimony.
Exhibits 6 to 13 inclusive and 17.
Stipulation as to exhibits.
Stipulation as to record.

R. G. DODGE,
For Plaintiff.

Assented to.
J. W. SULLIVAN,
For Defendant.

25 *Testimony.*

Johnson, J.

Appearances:

Messrs. Storey, Thorndike, Palmer & Dodge (Robert G. Dodge, Esq.), and Herbert Noble and James B. Sheehan, Esquires (of the New York Bar), Counsel for Plaintiff:
James W. Sullivan, Esq., Counsel for Defendant.

Evidence for Plaintiff.

Boston, Mass., November 27, 1917.

Mr. Dodge: If your Honor please, at the outset, may I present Mr. Herbert Noble and Mr. James B. Sheehan, of the New York Bar, counsel for the Standard Fashion Company, who are here to assist in the trial of the case?

Opening Statement by Robert G. Dodge, Esq., in Behalf of the Plaintiff.

The plaintiff is the Standard Fashion Company of New York. The defendant is the Magrane Houston Company, proprietors of a dry goods store in the city of Boston. The plaintiff is a manufacturer of patterns,—patterns for women's garments. The defendant, a dry goods store, had an agency contract with the plaintiff, which we say it has broken without justification. The contract was entered into as of November 25, 1914, and was to extend for successive terms of two years each until properly terminated. It could be terminated only at the end of some contract, or term of two years. Without proper notice the defendant threw out our patterns, and installed those of a competitor.

The Court: Was it necessary to renew the contract at the end of the two years?

Mr. Dodge: No, sir. The contract automatically renewed itself, unless notice was given within thirty days after the expiration of some contract term.

Now, what we seek by this bill in equity is, primarily, to restrain the breach of the covenant in the contract whereby the defendant agreed not to handle the patterns of any other maker That
26 is a common provision in pattern contracts, and we seek an injunction against the breach by the defendant of that negative covenant. We ask also for such damages as may be ascertainable.

The case is in most respects identical with the Massachusetts Supreme Court case of Butterick Publishing Company v. Fisher, 203 Mass. 122, the only difference being that, since the decision of the Fisher case by the State Supreme Court, the Clayton Act has been passed by Congress, and it is claimed, presumably, in this case—it is a claim that we have met frequently—that these contracts of ours are in violation of Section 3 of the Clayton Act. We are very much interested in getting a decision from this court, if we are entitled to it, as we think we are, that our contract is valid under the Clayton Act.

Now, with that preliminary statement, I will read the bill, which sets out the facts pretty completely.

[The bill of complaint is read by Mr. Dodge.]

Before reading the contract I will read the defendant's answer.

[The defendant's answer is read by Mr. Dodge.]

The pleadings seem to present, therefore, three main issues,—First, one of construction of the contract, as to the time when it could be terminated.

Secondly, the effect of the installation of an agency by the plaintiff with the R. H. White Company during the pendency of the defendant's contract. And

Third, the issue of prevention of competition and establishing of a monopoly, which we assume is Section 3 of the Clayton Act.

Now, the contract is short, and I will read it. It is on the printed form which, as will appear, is in use with perhaps 6,000 agencies of the Standard Fashion Company in this country; and on reading it your Honor will observe that it does establish what is an agency. While the title of the patterns passes to the agents, it is only a qualified title that the agent gets, because every pattern that he does not sell comes back to the Standard Fashion Company at a very large percentage of its original cost. The only object of the contract is to get the patterns into the hands of the ultimate consumer:

27 *"Mutual Agreement between the Standard Fashion Company, of New York, First Party, and Magrane Houston Co., of Boston, State of Mass., Second Party.*

First party hereby grants to second party an Agency for the sale of Standard Patterns for their store in the City of Boston, State of Mass., for a term of two years from date hereof, and from term to term thereafter until this agreement is terminated, as hereinafter provided,"—

and I will pass down now at once to the provision on that subject which occurs later on.

The Court: Read that again, please.

Mr. Dodge: The agency is granted.

"for a term of two years from date hereof, and from term to term thereafter until this agreement is terminated, as hereinafter provided."

The later provision is:—

"Either party desirous of terminating this agreement, must give the other party three months' notice in writing, within thirty days after the expiration of any contract period as above specified,"

which we construe, of course, as meaning after the expiration of any term of two years as above provided:

"and agrees to sell and deliver F. O. B. New York, or at its Branch office in Boston, Mass., to second party, * * * [etc., reading the contract]. It is hereby acknowledged by both parties that there

are no verbal understandings between them conflicting with this contract."

The conditions on the back I need not read at the present time. It gives the rates at which the advertising matter is to be taken

Now, there is nothing in the contract with reference to the Magrane Houston Company's having an exclusive agency. There is no agreement on the part of the Standard Fashion Company not to establish any other agency; and indeed it will appear in evidence that at the time when this contract was made the Standard Fashion Company's patterns were being sold at another store in Boston very near the Magrane Houston Company's store.

The contract is dated November 25, 1914, and the two years
28 expired November 25, 1916. Up to the expiration of thirty days after November 25, 1916, no notice had been received and it was not until some time in the spring of 1917 that the defendant undertook to give notice of the termination of the contract. We say that the contract automatically became extended until November 25, 1918, and could not be determined, under its provisions, until three months after November 25, 1918, that is, until February 25, 1919. So that when the defendant, on July 7th of this year, abolished its department for the sale of our patterns and installed the McCall Company's patterns, there were 19 2-3 months of the contract period for which we were entitled to have the agency continue.

There is just one other point that perhaps I should call attention to in opening now, and that is on this question of the impossibility of determining damages. A minimum amount of damages can be estimated, because of course we can show the profits that we made from this agency during the two years and more that it continued, which I take it would be admissible in evidence as to the profit we should have made if it had been allowed to continue. But there are other, perhaps more important, features of the damage which cannot possibly be estimated. The agent has to buy these sheets and other advertising matter from us at a certain low price, and has to distribute them free, and that is one of the important functions that he performs. Women coming into the store to buy goods get these fashion sheets and take them home, and may or may not buy the patterns ultimately at the Magrane Houston Company store. The distribution by the agent in a large city like Boston of the fashion sheet and other advertising matter leads to trade in the patterns which may appear in various other stores, and we cannot determine how much business we lose through the Magrane Houston Company's failure and refusal to deliver any more of our advertising material. More important than that is the serious damage to the plaintiff company's good-will through the fact that the defendant not merely ceased to represent us, but that it installed the patterns of our competitor and business rival, the McCall Company. It becomes advertised everywhere about
that the Magrane Houston Company store has thrown out the
29 Standard patterns and put in the McCall. The Standard trade, which ought to come to us, is diverted to the McCall Company, and our reputation and business are very seriously inter-

fered with. Damages for that cannot be estimated in dollars and cents. In the Fisher case, in the Supreme Court of Massachusetts, the court said that it is impossible to determine the damages in this case for various reasons.

Now, that case differed from the present one in this respect only, that there the agency had not even begun, and therefore there was no part of the damage that could be determined. Mr. Fisher had a contract, but he broke it before the time for beginning its performance came; that is, he repudiated it, and there was no experience upon which he could estimate any part of the damage. Here we have more than two years' actual experience with this agency.

Mr. Scanlon and Mr. Marsh, will you be sworn?

Mr. Sullivan: May I ask your Honor to suspend just a moment while I go to the other court room? My client possibly is there. He went to get a contract at the store, and he has not come back.

The Court: We will suspend for a few moments.

[Recess of ten minutes.]

Mr. Dodge: Here are the pleadings, your Honor. A copy of the contract is annexed to the bill [passing document to the Court].

JOHN T. SCANLON (sworn):

Mr. Dodge: Before proceeding with Mr. Scanlon, may I read Section 3 of the Clayton Act? I meant to read that before.

The Court: It has been read a good many times, but I have forgotten it.

Mr. Dodge: It is the Act of October 15, 1914:

"Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

We say two things at least in regard to that here,—first, that our contract is an agency contract and not an outright sale, and therefore does not come within the section at all; and, second, that if our contract is to be treated as a contract of sale, it is plainly not a contract of sale the effect of which is to substantially lessen competition or tend to create a monopoly.

It does appear in the House and Senate reports covering the Clay-

ton bill, which I take it are admissible upon the question of construction—it does appear in both of those reports that this section was not designed to reach agency contracts. Here is the report in the House of Representatives:

"It has been contended very earnestly that its provisions prevent exclusive or sole agencies. It not only does not prohibit or forbid exclusive agencies, but on the contrary it in no way whatever relates to agencies properly so termed."

The Court: Are you reading from some remarks of a senator?

Mr. Dodge: No, sir; not from a debate. This is a committee report. I understood that the reports of committees to the houses of Congress are admissible in aid of construction of legislation, although debates in House or Senate might not be. The Senate report is in the same language.

(By Mr. Dodge:)

Q. 1. Mr. Scanlon, what is your full name?

A. John T. Scanlon.

Q. 2. And you are president of the Standard Fashion Company?

A. I am.

Q. 3. You live in New York?

A. New York.

Q. 4. How long have you been president of the company?

A. Since 1906; eleven years.

31 Q. 5. And before that time were you in the employ of the company?

A. I was general manager of the company from 1900, I should think.

Q. 6. Before that what were you?

A. I was in the employ of another pattern manufacturing concern.

Q. 7. How long have you been in the pattern business?

A. Twenty-eight years.

Q. 8. Is the Standard Fashion Company a New York corporation?

A. It is.

Mr. Dodge: I offer the certificate of incorporation.

[The certificate of incorporation of the Standard Fashion Company, dated May 13, 1887, is marked "814 Eq., Pl'ff's Ex. 1, J. E. G., Jr., Dep. Clk., 11/27/17".]

Q. 9. What is the business of the Standard Fashion Company?

A. The business is the publishing of fashions periodically and the manufacture and sale of patterns.

Q. 10. Where does it manufacture?

A. In New York; do you mean the particular address?

Q. 11. Oh, no.

A. Yes, in New York. The whole establishment is in New York City.

Q. 12. And where does it print its advertising material?

A. In New York also.

Q. 13. That advertising material consists of regular periodical publications?

A. Yes, several; chiefly, that is, the one of the biggest edition, a monthly fashion sheet, which is distributed through agencies, and to some extent direct. That has a circulation of about two millions or a little more a month.

Q. 14. Those are the fashion sheets?

A. Those are the fashion sheets; yes.

Q. 15. Is that a sample copy [passing a publication to the witness]?

A. That is one of our fashion sheets; yes, sir.

Q. 16. One of the monthly publications?

A. That is a monthly publication.

Mr. Dodge: I will offer that.

[The publication entitled "Standard Fashions" is marked "815 Eq., Pl'ff's Ex. 2, J. E. G., Jr., Dep. Clk., 11/27/17".]

32 Q. 17. Now, apart from your monthly advertising publication, what other such publications have you?

A. We also publish what we call the "Standard Quarterly," a standard journal of considerable size, which is published four times a year, and which has a circulation of something like 250,000 an issue.

Q. 18. That also is devoted very largely to advertising your patterns?

A. That is devoted pretty much altogether to an illustration and description of our patterns and styles. There is, of course, some fashion editorial matter in it which bears on the same subject.

Mr. Dodge: I offer this.

[The "Standard Quarterly" is marked "815 Eq., Pl'ff's Ex. 3, J. E. G., Jr., Dep. Clk., 11/27/17".]

Q. 19. And is there anything besides those two?

A. Well, we publish a monthly magazine of general interest to women, called "The Designer." It is a household magazine, dealing with subjects of general feminine interest, and it is also devoted to a certain extent to fashions.

Q. 20. Is that one of your means of advertising your patterns?

A. It is one of them, but in a lesser degree.

Q. 21. Does it figure at all in the agency contracts?

A. Not at all.

Q. 22. Then we will pass that by. Is there any other form of publication which is used in advertising your patterns?

A. Yes; we have the Standard Fashion Catalogue, a semi-annual catalogue.

Q. 23. This is a copy of the semi-annual catalogue, is it?

A. Yes. That is revised and published semi-annually, and kept up to date by monthly supplements, that is, there are supplements published monthly, which, added to it, keep it up to date in the matter of Standard fashions.

Mr. Dodge: I offer this Standard Fashion Catalogue as Exhibit 4.
[The Standard Fashion Catalogue is marked "815 Eq., Pl'ff's Ex. 4, J. E. G., Jr., Dep. Clk., 11/27/17".]

Q. 24. Now, the patterns that are made by your company reach the ultimate consumer how? How are they marketed?

A. The distribution is made pretty much altogether
33 through agencies. Of course we do considerable direct business also, but our plan of business is to establish agencies everywhere, as depots to which our customers may go to get patterns, the patterns they select from our magazines, principally the fashion sheet. They identify the pattern which strikes their fancy in connection with the number which is given to each illustration, and they go to these agencies to make their purchases of these Standard patterns.

Q. 25. How many agencies have you?

A. About six thousand.

Q. 26. In the United States?

A. No; I should say that that would include Canada, too. There may be about 6,200. That includes Canada.

Q. 27. And are they all acting under contracts in the same general form as the one in the case at bar?

A. Our contracts with these merchants are uniform as to form, that is, as to terms. The number of fashion sheets furnished, and the distribution of stock, differs in different localities.

Q. 28. In what kind of stores is it most advantageous to place the agency?

A. In dry goods stores, where piece goods and fabrics of that kind are sold; those make the most desirable agencies, where the customers can buy the goods for the garments that are made with the aid of our patterns.

Q. 29. Why is that the best kind of a store for your agency?

A. Well, it seems natural enough that where a woman goes to buy her materials, if she can at the same place buy the patterns, the combination is a good one it encourages the use of the patterns. It seems to me a natural enough situation.

Q. 30. Perhaps you have stated it, but I will ask you, so as to be sure, how your publications advertising the patterns are distributed? How do they get into the hands of the public?

A. Largely through our agencies. To some extent through direct circulation.

Q. 31. Do the agents sell them or give them away?

A. The fashion sheets they give away. They are required, as a contract matter, to distribute them free. They buy them from us at the price stipulated in the contract, and the contract provides
34 that they are to distribute them free to the customers. That is the fashion sheet, you understand.

Q. 32. Yes. How are the others circulated?

A. The Quarterly, the Standard Quarterly, is sold through agencies or direct. The price is twenty-five cents. Every agency handles the Quarterly, and has a very considerable sale of it.

Q. 33. How about the semi-annual publication?

A. The semi-annual publication has a circulation of sixty to eighty thousand an issue. I think that that is used largely by dressmakers and other large users of patterns, who want it for display to their customers, perhaps.

Q. 34. I think you gave the circulation of The Designer and of the monthly sheets?

A. The Designer has a circulation of about 350,000 to 400,000, somewhere along there; the fashion sheets has a circulation of something over 2,000,000 a month; about 2,000,000 a month.

Q. 35. What is your output of patterns?

A. Our output of patterns is something upwards of a million a month.

Q. 36. Is the pattern what you might call a perishable article?

A. I should say that a pattern is a peculiarly perishable article. It is a diagram for the construction of a garment that is in style, and there is no desire for the use of a pattern for an article unless it is in style. Where the style is not current there is no sale at all for the pattern.

Q. 37. Let me ask you how many kinds of styles a complete set of patterns handled by one agent comprises?

A. Our catalogue illustrates every style that we call current, and there are about 1,200 in one book, I think.

Q. 38. Should every agent carry at least one pattern for every style?

A. Well, you understand—it should be understood—that each pattern that represents a given style is made and cut in different sizes so that women of different measurements, and children of different measurements, can get a precise fit.

Q. 39. How many different sizes are there?

A. Oh, it would average, I should say, seven.

Q. 40. Seven sizes of each of 1,200 styles?

35 A. Yes. Some styles, maybe, are in five or six sizes only; some in seven and eight, and some more.

Q. 41. And does every agent have to carry a complete set?

A. No. We try to regulate that with the closest possible reference to the business of the particular agency. In that great bulk of smaller agencies they carry only two sizes of each style, unless it is an extreme style, and they don't carry that at all.

Q. 42. But practically all the styles?

A. We have practically all the styles carried so that the purchasers can select the pattern of any style that we publish.

Q. 43. Do styles change very quickly?

A. Yes, some styles do. Some styles are staple. Underwear and that sort of thing sometimes remains for some time without change. The outer garments change very quickly, however.

Q. 44. How many patterns do you get out a month, on an average?

A. On an average, sixty or sixty-one; something like that.

Q. 45. Different styles?

A. Different styles.

Q. 46. When patterns are returned to you as being out of style, have they any value?

A. Yes; simply as waste paper.

Q. 47. Simply as waste paper. You do send them, I believe, to a concern that makes paper to be re-made?

A. All of our old patterns are bought and used by the makers of our patterns, I believe, who repulp them in some way.

Q. 48. The pattern is sold under the name of Standard Patterns?

A. Standard Patterns.

Q. 49. And how long have the patterns been sold under that name?

A. Since 1887; thirty years.

Q. 50. Sold in all parts of this country?

A. Yes.

Q. 51. And in Canada?

A. And in Canada.

Q. 52. And is the pattern invariably known under that name, Standard?

A. That is the only name under which it has ever been known,—Standard Pattern.

Q. 53. Is the name Standard Pattern a valuable asset?

A. I should say that that was a very valuable asset.

Q. 54. Are the patterns all numbered so that a person may order them by reference to the designs in the advertising sheets?

36 A. The patterns are invariably ordered by number, identified by number.

Q. 55. And is that a sample pattern [passing a paper package to the witness]?

A. That is one of our Standard Patterns.

Q. 56. And is it a fact that you always have a picture of the completed garment on the outside?

A. Always.

Q. 57. And indications as to the numbers of the different parts of the pattern that are inside?

A. We give a diagram of the different parts of the pattern—an outline diagram.

Q. 58. And of course these patterns when sold by any agent are sold as Standard Patterns?

A. Yes.

Q. 59. And not as the agent's patterns?

A. No; they are never identified in any way with an agent; they are known as Standard Patterns, and sold as such.

Mr. Dodge. I offer that Standard Pattern.

[The Standard Pattern referred to is marked "815 Eq. Pl'ff's Ex. 5, J. E. G., Jr., Dep. Clk., 11/27/17."]

Q. 60. How long has the Standard Fashion Company done business in Boston?

A. Well, to my knowledge, for twenty-eight years. I suppose it has done business for thirty years, since it was established, probably.

Q. And has it at different times had different agencies in Boston?

A. It has; yes, it has been variously represented in the matter of agencies.

Q. 62. And any agency that you have had in Boston has, of course, received the goods by shipment from the factory in New York?

A. All of our goods are manufactured in New York for distribution to the different establishments.

Q. 63. And shipped from there to the different agencies?

A. Yes, sir.

Q. 64. You are familiar with the fact that a contract was made at a certain time with the Magrane Houston Company?

A. Yes; I was acquainted with all the details of the matter.

Q. 65. And at that time, November 25, 1914, were the Standard Patterns being sold elsewhere in Boston?

A. Oh, yes.

Q. 66. Where were they being sold at that time?

37 A. We had a little sales room on Washington Street, and we also had an agency in the Houghton & Dutton store.

Q. 67. The sales room on Washington Street was where?

A. I really don't recall the number. In the block between Jordan & Marsh's and White's,—in that block, on that side of the street.

Q. 68. Was that Grosberg's store?

A. Yes, Grosberg was the party who let the store.

The Court: You said an agency in the Houghton & Dutton store, and a sales room in the other place?

The Witness: An agency at Houghton & Dutton's, and a sales room at this little Grosberg store.

The Court: Did you have an agency at the Grosberg store?

The Witness: No; we conducted that ourselves.

Q. 69. Was the matter of the establishment of relations between yourselves and the Magrane Houston Company opened up by you or by them?

A. We received a letter from them asking us to advise them of our agency terms, with the view to making an agency arrangement.

Q. 70. And is that the letter [passing a paper to the witness]?

A. Yes, that is the original application, dated October 14, 1914.

Q. 71. And a copy of your reply is annexed to it?

A. That is my reply; yes.

Mr. Dodge: I suppose that you have the original of our reply of October 22d, 1914?

Mr. Sullivan: We don't seem to.

Mr. Dodge: Then I will offer the carbon copy.

Mr. Sullivan: All right.

The Court: Do you object to the use of a copy?

Mr. Sullivan: No, sir.

Mr. Dodge: They may be marked as one exhibit. They are fastened together. The letter from the Magrane Houston Company of October 14, 1914, is as follows:

"Oct. 14, 1914.

The Standard Pattern Co., New York.

GENTLEMEN:

We are led to believe that our agency with the Ladies' Home Journal pattern expires within a short time and as we desire to
38 make new connections, will you kindly let us know if you are interested in making a proposition to us and oblige,

Yours very truly,

MAGRANE HOUSTON CO.
CHARLES H. WILSON."

And the reply is dated October 22d, 1914:

"October 22nd, 1914.

Magrane Houston Company, Washington Street & Temple Place. Boston, Mass.

GENTLEMEN:

Replying to your Mr. Wilson's letter of October 14th, I write to say, let me hear from you when the termination of your present pattern arrangement is fixed, and, I shall then be pleased to take up the matter with you.

Respectfully, —— ——."

[The letter from Magrane Houston Company to the Standard Pattern Company, dated October 14, 1914, attached to which is a carbon copy of letter from the Standard Pattern Company to Magrane Houston Company, dated October 22d, 1914, is marked "815 Eq., Pl'ff's Ex. 6, J. E. G., Jr., Dep. Clk., 11/27/17."]

Q. 72. You thereafter had no direct dealings with the Magrane Houston Company yourself?

A. No. Negotiations resulted from that which were conducted for us by our Mr. Robert Kelly.

Q. 73. That was handled through your representatives under your directions, but not by you personally?

A. Yes.

Q. 74. Is this the original contract as executed by both parties [passing a paper to the witness]?

A. That is the original contract.

Q. 75. And is that the detailed order that accompanied it [passing another paper to the witness]?

A. That is the original detailed order also. I was looking for that identification stamp.

Q. 76. Yes. Does the detailed order add anything to the contract, except that it specifies the number of publications per month that shall be taken to make up the gross amount named in the contract; that is, it distributes the advertising matter which the agent agrees to take among the different months,—that is about all there is to it, isn't it?

A. That expresses the purpose of it. The main contract states the yearly quantities and the detailed order puts it on the
39 monthly quantities basis, arranged properly as to seasons.

Mr. Dodge: I offer the contract and the detailed order.

[The contract between the Standard Fashion Company and the Magrane Houston Company dated November 25th, 1914, is marked "815 Eq., Pl'ff's Ex. 7, J. E. G., Jr., Dep. Clk., 11/27/17", and the detailed order from the Magrane Houston Company to the Standard Fashion Company dated November 25th, 1914, is marked "815 Eq., Pl'ff's Ex. 8, J. E. G., Jr., Dep. Clk., 11/27/17."]

Q. 77. After the contract was made did you proceed with the performance of it?

A. We did.

Q. 78. Did you deliver the patterns and other matter called for by the contract, as called for by it?

A. We did.

Q. 79. Perform the contract in all respects?

A. Yes.

Q. 80. Did the contract prove profitable?

A. It did.

Q. 81. Did you get any notice of termination of the contract at any time within thirty days after the expiration of the first two-year period?

A. No.

Q. 82. At some time in the spring of 1917 did you get a notice that the defendant desired to terminate the contract?

A. Yes. We received a letter from him. I made a memorandum from the original record, if you will permit me to refresh my memory about it, that I think mentions the date.

Q. 83. Well, I think I have the letters here. Is that [passing a paper to the witness] the first intimation which you received of any intention on the part of the defendant, or any desire on the part of the defendant, to terminate the contract?

A. That is the first intimation—that is the first letter or advice we received from them of their intention to terminate the contract.

Mr. Dodge: That is the letter of March 21, 1917, Mr. Sullivan. It reads:

"The Standard Fashion Co., 12 Vandam St., New York, N. Y.

GENTLEMEN:

Inasmuch as we have been advised you have decided to do business with the R. H. White Co., such information being confirmed by your Mr. Marsh today, we would respectfully ask that you discontinue
40 with us at the earliest possible date. Under our contract with you it is stated we are to give you three months' notice, we prefer, however, to discontinue by the time of the next issue. A prompt reply will greatly oblige,

Yours very truly,

MAGRANE HOUSTON COMPANY,
By C. A. HANLEY.

P. S.—As requested by Mr. Marsh, we are sending a copy of this letter to him."

[The letter of which the foregoing is a copy is marked "815 Eq., Pl'ff's Ex. 9, J. E. G., Jr., Dep. Clk., 11/27/17".]

Mr. Sullivan: Here is the reply [passing a paper to Mr. Dodge].

Mr. Dodge: The reply, which I now have, is dated March 23d, 1917:

"Messrs. Magrane Houston Company, Washington Street & Temple Place, Boston, Mass.

GENTLEMEN:

We duly received yours of the 21st, requesting an immediate release from contract obligations, because of arrangements we have made for selling our goods to the R. H. White Company.

We respectfully decline to accede to your request, and in our opinion, there is nothing in the situation which justifies your making it.

As your letter seems to disclose a belief that our agreement with you can be terminated by three months' notice at any time, it is perhaps desirable that we should advise you that such is not the case, and that you are under engagement to handle our goods for the next two years.

Yours very truly,

STANDARD FASHION COMPANY.
J. BREWIS."

[The letter of which the foregoing is a copy is marked "815 Eq., Pl'ff's Ex. 10, J. E. G., Jr., Dep. Clk., 11/27/17."]

Q. 84. Was that letter of April 7, 1917, which I now hand you, the next communication you got from them [passing a paper to the witness]?

A. This is the next communication relating to that matter; yes, sir.

Mr. Dodge: The letter of April 7, 1917, I offer:

41 "The Standard Fashion Co., Van Dam St., New York, N. Y.

GENTLEMEN:

The Magrane Houston Co. of Boston, Mass., hereby notify you that they have decided to terminate the sale of your Standard Fashion Patterns in their store in three (3) months from the above date, which is in conformity with the contract entered into between your company and the Magrane Houston Company, dated November 25, 1914.

Very truly yours,

P. B. MAGRANE,
President.

[The letter of which the foregoing is a copy is marked "815 Eq., Pl'ff's Ex. 11, J. E. G., Jr., Dep. Clk., 11/27/17."]

I offer the reply of April 11th, 1917, from the Standard Fashion Company to the Magrane Houston Company:

"GENTLEMEN:

We have your Mr. P. N. Magrane's letter of April 7th.

Replying thereto, we beg to refer you to your copy of the contract (if your copy is misplaced we shall be glad to send you another copy) under the conditions of which notice for the termination of the contract between us is not in order at this time.

Very truly yours,

STANDARD FASHION COMPANY."

[The letter of which the foregoing is a copy is marked "815 Eq., Pl'ff's Ex. 12, J. E. G., Jr., Dep. Clk., 11/27/17."]

Q. 85. During this time you had no personal interviews with the Magrane Company?

A. None whatever.

Q. 86. At some time thereafter were you advised that they had definitely terminated the sale of your patterns and the distribution of your advertising material?

A. As I recall, our Boston manager telephoned me, called me on the telephone, in July, and advised me that the McCall patterns were on sale, and that the sale of ours had been discontinued.

Q. 87. Do you remember what date in July it was that you learned that?

A. Yes [referring to a memorandum]; July 9th.

Q. 88. July 9th of this year, of course?

A. July 9th of this year.

Q. 89. Since that time have your patterns been handled by the defendant at all?

A. Not to my knowledge. On the contrary, so far as I know, they have not handled them.

42 Q. 90. The McCall patterns have been on sale over there ever since, so far as——

A. The McCall patterns have, so far as I know.

Q. 91. In July, when the agency was terminated by them, were you ready, able and willing to go on with it?

A. We were.

Q. 92. And did you make a written tender of performance to the defendant?

A. I wrote a letter to them, following Mr. Marsh's telephone message, and asked him to deliver it to them, which I believe he did.

Mr. Dodge: Have you a letter of July 14th, 1917?

Mr. Sullivan: No. Is Mr. Marsh here?

Mr. Noble: Yes.

Mr. Sullivan: Subject to Mr. Marsh's verification, he is going to testify, is he, that he delivered it to us?

Mr. Dodge: Yes.

The Court: Is Mr. Marsh here?

Mr. Sullivan: Yes, sir; he has been sworn.

Mr. Dodge: Was that letter of July 14th, 1917, delivered [passing a paper to Mr. Marsh]?

Mr. Marsh: Yes.

Mr. Dodge: I understand you don't object, Mr. Sullivan?

Mr. Sullivan: Not if he is going to testify that he delivered it.

Mr. Dodge: Yes.

"July 14th, 1917.

Messrs. Magrane Houston Company, Washington Street &Temple Place, Boston, Massachusetts.

GENTLEMEN:

We are in receipt of advice from our Boston representatives that you have placed on sale in your store on Washington Street and Temple Place another make of patterns than Standard Patterns, namely, McCall Patterns manufactured by the McCall Company.

This is in violation of your contract with us, which provides among other things, that you shall not sell or permit to be sold on said premises any make of patterns other than Standard Patterns.

We hereby demand that you immediately withdraw from sale in said premises any make of paper patterns other than Standard Patterns and that you restore Standard Patterns to sale in said
43 premises, and that you proceed to continue to perform all the conditions of your contract with us for the balance of its term.

Very truly yours,

STANDARD FASHION COMPANY.
J. T. SCANLON,
President."

And in pencil at the bottom: "Deld. by Mr. Marsh to Mr. Hanley July 17, 1917—12.15 P. M."

[The copy of letter of which the foregoing is a copy is marked "815 Eq., Pl'ff's Ex. 13, J. E. G., Jr., Dep. Clk."]

The Court: What is the date?

Mr. Dodge: The date is July 14th, 1917.

Q. 93. Now, referring again to the contract, Exhibit 7, you say that this is in the regular form of agency contracts?

A. Yes, that is our regular printed form of agency contract.

Q. 94. There are various other concerns, are there, that are selling patterns and issuing advertising material, conducting a similar business, manufacturing and selling patterns?

A. Oh, yes; there are six or eight concerns in the business.

Q. 95. And what are the other principal concerns that are in a business similar to that of the Standard Fashion Company?

A. The McCall Company, the New Idea Company; they make a pattern; the Pictorial Company, the Butterick Company, the Home Company; that makes the pattern coming in what is known as The Ladies' Home Journal, and the Peerless Company and the May Manton Company. I think those are the chief manufacturers of patterns.

Q. 96. And is the McCall Company one of the largest pattern concerns?

A. Why, it seems to be the largest pattern company of any individual concern.

Q. 97. Do the other pattern companies, like yourselves, sell patterns to local agencies, in the main?

A. All the concerns mentioned except the May Manton Company market their products in substantially the same way that we do.

Q. 98. And are you familiar with the standard form of contracts which they have with their agencies?

A. Oh, yes; I have occasion to see them regularly; it is almost a matter of daily occurrence.

44 Q. 99. And you are familiar with the way the pattern business is conducted by them, as well as by your own company?

A. Well, I consider it a part of my duty and a part of my business to keep in very close touch with all the concerns in the business.

Q. 100. Whether or not the agency contracts of the other companies are substantially like that of the Standard Fashion Company?

Mr. Sullivan: I don't want to be captious, and there is not much of an issue of fact here, probably, but it strikes me that that is going rather far.

The Court: It strikes me that it is going pretty far to go into the contracts made by other companies. What bearing does it have on the interpretation of this contract?

Mr. Dodge: I will withdraw that for the present. It may be that I can make it competent later.

Q. 101. Did the defendant under this contract exercise the right of semi-annual return of patterns?

A. Yes.

Q. 102. And I want to ask you in regard to the provision in the contract that the agent shall not handle the patterns of any other manufacturer. Whether or not the agencies of pattern manufacturers in this contract are commonly exclusive agencies in that way, or not?

A. Yes, sir, practically altogether. I don't know of ten exceptions among the probably thirty or forty thousand stores handling patterns.

Mr. Sullivan: I object to that. Whether they are exclusive agencies or not I suppose depends upon the construction of the contract in each case.

The Court: It seems to me so.

Mr. Dodge: Well, that, if your Honor please, seemed to me to be competent, because I am dealing now with the question of competition and monopoly, etc., under the Clayton Act.

The Court: At the present time it is this contract that we are dealing with. What other companies have done with their contracts it seems to me is immaterial. It is what was done here.

Mr. Dodge: I think that that is entirely so, unless the fact that the Clayton Act is involved here makes it competent. It is only on that issue that I offer it.

45 The Court: Whether other companies have successfully violated the Clayton Act or not does not interest us here, of course.

Mr. Dodge: It seems to me that on the question of whether there was a substantial attempt to acquire a monopoly, or a substantial limitation of competition, the question of universal methods, the methods of all companies in the business, might have a bearing.

The Court: Mr. Scanlon has already testified to the number of concerns doing a similar business in this field. That is covered pretty well.

Mr. Dodge: I wanted to show their method of doing it under the contract.

The Court: What the methods pursued by the different companies are it seems to me is immaterial here.

Mr. Dodge: I think that possibly that question may be competent later on, your Honor, in connection with the point made by the defendant in his answer, that we could establish another agency just as good somewhere else in Boston.

The Court: Then we will pass it for the present.

Mr. Dodge: We will pass it for the present.

Q. 103. I will ask you this question, with regard to the clause in your contract with the defendant, that the defendant should not handle any other make of patterns: I want you to explain to his Honor the advantage, if it be an advantage, to the manufacturer, the agent and the public, as you see it, to have an agent handle only one make of patterns.

A. Well, as I have said, I have been in this business twenty-eight years, and in all that time there has never come under my observation a condition where more than one make of pattern was handled in one store, and my experience in the business and knowledge of it induces me to believe very firmly that any other condition for the handling of the patterns would result disadvantageously to the manufacturer, and to the merchant acting as agent, and to the public, for this reason,—may I detail my reasoning on the matter?

Q. 104. Yes.

A. Take it, for instance, in the average town of say, 10,000 population, where there are five or six stores, and each of them han-

dles a pattern. Each of them, we will assume, does a
46 business of a thousand dollars a year in patterns, which would be about the business expected to be done in a town of 10,000 population. Now, if each of those stores were to handle all of the makes of patterns, or five or six, I cannot conceive that the total sales of patterns in the town would be materially increased,—that the sale of patterns and the use of patterns would be materially advanced. On the other hand, if each of the stores handled, say, five or six different manufacturers' patterns, they would have their overhead expenses and all the expenses incidental to the handling of patterns very largely increased; they would have investments in five or six different stock patterns, instead of in one; they would be at a disadvantage and loss in the exchanging of patterns, having to deal with five or six different stocks instead of one.

Q. 105. Could they cut down the amount of stock if they were carrying five or six stocks so that the total would be no larger than one stock?

A. No; I think not. To handle a business satisfactorily it is requisite that prompt service be given to the public, and if the stock is cut down it can be done only at the expense of the serviceability of the stock, and consequently, as I see the matter, it would discourage trade and result in a curtailment of the sale of patterns. If, for instance, a merchant, under present conditions, were carrying a complete stock in all sizes, and doing a business of a thousand dollars, and he changed his methods and had five stocks in which he did a business of $200 each, the total investment would then be the same as is represented in one stock, but he could not do so satisfactory a business, because if he had five separate stocks it would result in his carrying only about two sizes of each pattern, and the result would be bad service to the public, no doubt, as the matter rests in my mind.

Q. 106. How about the question of space in the store?

A. It follows naturally, I think, that if he has five stocks of equal size they will take up five times the space of one, and it takes up that additional overhead for rental of the appropriate space. And the five stocks could not be handled by one salesgirl, or by the number of sales persons that would ordinarily be required for one stock.

So that the merchant would have to duplicate his expenses
47 and make his service expenses behind the counter larger. And he would have anywhere from three to five times as much in the way of transportation charges during the month. He would have to distribute the fashion sheets for each of the makes of patterns in the same quantity that he would if he were handling only one, making his expenses for that part of it five times what they would be if he handled only one. That is from the merchant's standpoint. Now, from the pattern manufacturer's standpoint: In handling a thousand dollars' worth of business, selling patterns to the public out of the stock necessary for the handling of that business, his exchanges of patterns are a fixed amount; they will average a certain figure. Now, if the merchant carries five stocks, which he would have to do if he represented five pattern manufacturers, and

the sale of any one pattern in that store should be reduced to one-fifth its normal volume, then the exchanges would be so large as to make the business quite unprofitable to the manufacturer, and under those conditions we could not afford to place our patterns with agencies under the terms that we now do; our expenses on the exchange of patterns would be so large as to make it quite impossible, and we would have to change the terms to a less favorable basis to the merchant, or very substantially increase the retail price to our public. Now, from the standpoint of the public: As I see it, there would be less satisfaction in doing business under those conditions than there is now. As I stated, the manufacturer could not give the present terms unless he got the business that is contemplated by the present methods. If the handling of the business should be made more expensive, we would have to narrow the terms to the merchant or increase the price to the public. If the merchant kept up the five stocks in serviceable shape, so as to give the same satisfactory service with the five stocks that he had given with one, his expenses would be so largely increased that the losses would prevent his keeping on with the business for any length of time, and the result would be that he would have to give it up, and the public would be deprived of the facilities for securing the patterns. So, as I say, the public would have the alternative of paying a very much larger price for the patterns than they now pay.

48 The Court: Do you fix the basis on which the patterns shall be sold?

The Witness: We print on the label of each pattern the price at which it is required to be sold.

Q. 107. What is the price of the average pattern?

A. About twenty cents, or nineteen cents.

Q. 108. Whether or not one of the chief differences between patterns and other goods is to be found in the necessity, in the case of patterns, that the agent shall carry all these different styles? He cannot cut his pattern stock into quarters, and take on four different kinds, making an aggregate of no more patterns, can he?

A. No. I have stated that there are a thousand or twelve hundred styles that are current styles, out of which the public is making its selections every day. Now, in the smallest community the variety of styles will be as great as it is in the biggest city, so that these stores in the different little communities have to carry all the styles, and limit only the number of sizes, so as to keep their stock within a reasonable ratio to the volume of retail business.

Q. 109. Do you sell direct to the public?

A. Oh, yes, quite largely.

Q. 110. And in your sales to the public do you undertake to impose any condition whatever on the purchasers?

A. None whatever; no.

Q. 111. You sell at the ordinary retail prices?

A. At the ordinary retail prices. We do that in the sales rooms, and we do a very considerable mail order business.

Q. 112. Your contract contains a provision restricting your agent from selling below the retail prices?

A. Yes.

Q. 113. What is the object of that clause?

A. It has been a custom in the business ever since I have been connected with it to make contracts with the merchants, and as a matter of business we make them to cover a term of years, so that we won't have to be at the expense of sending agents round to them every year or two to get them to renew their contracts, and those contracts also renew themselves, to bring about what we consider a proper economic administration of the business. Now, a
49 merchant signing that contract, as we see it, is entitled to expect to make a profit on the business during the time he carries it on. If the merchant were threatened with competition from other merchants, in the neighboring town, or in the neighboring square, perhaps, in the sale of the same patterns, at prices other than those at which he himself is required to sell them, he could not do business at a profit; he could not compete with price-cutting in the next block, or in the next community. Now, in undertaking to make a contract with us for a term of years, it is only ordinary prudence on his part to require that he be protected in securing from the public a fixed price; and we fix the price largely in view of those considerations.

The Court: Do you understand that in this contract there is any agreement that the party of the second part shall have the exclusive agency in the city of Boston?

The Witness: I beg your Honor's pardon?

The Court: Is there any agreement in this contract, do you understand, that the party of the second part, the defendant here, shall have the exclusive agency in any part of the City of Boston.

The Witness: In what sense, sir, are you using the word? Do you mean an exclusive sale of our pattern in his store, or in a given territory?

The Court: In a given territory.

The Witness: No, sir. There was no such provision.

The Court: You were speaking about the protection of the agent, and saying that you thought that the agent ought to be afforded protection by establishing a price at which agents bound themselves to sell your patterns only in a certain territory?

The Witness: Well, we very, very seldom, practically not at all——

The Court: In other words, was there a binding agreement on your part not to have another agency in that territory?

The Witness: No, there is no agreement on our part not to have another agency in the same territory.

Q. 114. But this agent does have the promise that if you do have another agent in that territory he will have to sell at the
50 same prices?

A. He could not under our contract sell to the public at different prices; he must sell at the same prices.

Q. 115. That is, your agencies and your own concern are at all times selling the patterns at the same prices?

A. Yes.

The Court: And in this particular section of the City of Boston

where the defendant is located, after making that contract with the defendant you were at liberty to make as many more contracts establishing agencies as you saw fit?

The Witness: Well, I will have to make an explanation with regard to that, your Honor. At the time we made the contract with the defendant we were. Subsequently I made a contract with the R. H. White Company that is referred to in the bill or answer. Now, when I made the contract with the R. H. White Company they raised the question as to how many agencies we were going to place, and I agreed with them that we should place no other than the one with the Magrane Houston Company.

Mr. Dodge: Within a quarter of a mile.

The Witness: Within a quarter of a mile; some circumscribed area representing the shopping district.

Q. 116. Right along that line, I will ask you whether or not at the time you established your agency with the Magrane Houston Company nearly all of the department stores and dry goods stores in the vicinity were occupied by agencies of one or another of the pattern companies.

A. Yes. Of my own knowledge I may say that every department store down town, except R. H. Stearns and Filene, was handling patterns. You will notice that in my response to their application I inquired particularly regarding the pattern contract which they then had with the home company. That is a thing that we have to keep in mind always in our arrangements for extending our agencies.

Q. 117. When the Standard Fashion Company started business in Boston what other concerns were there that were manufacturing and selling patterns?

A. Do you mean when we originally started, several years ago?

Q. 118. Yes.

51 A. The Butterick Company; the Demorest concern; and the Imperial, or some such concern. The Demorest was one, and I think the Imperial was the other.

Q. 119. So that all the other competing concerns that you have mentioned have come into business since that time?

A. Yes, all of the competing concerns have come into existence since the Standard Fashion Company started.

Q. 120. You mentioned six or seven other companies. Do you know of your own knowledge whether all of them have agencies within the immediate vicinity of the Magrane Houston store, that is, in the dry goods centre of Boston?

A. I have been into all the stores in Boston, and I have observed what patterns they handle, except the two prominent stores that I mentioned.

Q. 121. I was asking whether all the pattern companies which you mentioned when you gave us the list have their patterns handled in the immediate vicinity of the Magrane Houston Company's store in Boston?

A. Yes, all except possibly the Peerless. I don't recall any agency that the Peerless has; all the others have.

Q. 122. Do you recall of your own knowledge where the McCall Company has agencies in the centre of Boston?

A. Yes; I have seen their goods recently, besides in the Magrane Houston Company's store, in the Bacon store and in the Gilchrist store and in Butler's store.

Q. 123. The Gilchrist store on Washington Street?

A. The Gilchrist store on Washington Street.

Q. 124. And the Bacon store in the Siegel building?

A. Yes.

Q. 125. Are the patterns of all the concerns sold in Boston the same way, done up in envelopes like this?

A. All patterns are made up in just the same fashion.

Q. 126. And are of substantially the same kind of goods?

A. What do you mean by "goods?" The paper they are cut from?

Q. 127. Well, I mean they are completely and strictly in competition with each other. Are there any differences between the patterns made by other concerns and those made by yours, except that you, perhaps, claim to have better designers, and to get up more attractive styles?

A. Yes, the competition is extremely keen.

52 Q. 128. There is the same classification, is there not?

A. Yes, and they look very much alike; they fold them up alike, and put them in envelopes very much alike.

The Court: These patterns are confined to garments for women and children?

The Witness: Yes, for women and children. We make some patterns for men's garments, overcoats, etc., but we do not do that very extensively; there is not much occasion for it, though we do show on our catalogues patterns of men's garments.

Q. 129. I will ask you whether or not a contract of the sort which you have before you, and which you say is your universal form, has a tendency to create monopoly or to lessen competition in the pattern business?

Mr. Sullivan: I object to that.

The Court: That is a matter of opinion that it would be pretty difficult for him to answer, it seems to me. That is a question for the court, is it not?

Mr. Dodge: That is undoubtedly a question for the court. I will not press it if your Honor thinks that it is not proper.

The Court: It seems to me that it is really a question for the court to deal with, and that I should exclude it if it is objected to.

Q. 130. Perhaps Mr. Marsh is the man who should be asked about the number of other agencies that these different pattern companies have in Boston, the location of them, and so forth, or are you personally familiar with that?

A. No. I know the number of agencies throughout the country, throughout the United States and Canada, that handle patterns, but I guess that Mr. Marsh could answer better for Boston.

Q. 131. How many agencies has your company in Boston today?
A. I couldn't state positively; I suppose eight or ten.
Q. 132. That is, in the entire metropolitan district?
A. Yes.
Q. 133. How many have you in Boston proper?
A. Do you mean in the down town section?
Q. 134. In the down town retail dry goods section; yes.
A. I guess only the R. H. White Company now.
Q. 135. Only the R. H. White Company?
A. Yes.

53 Q. 136. As a matter of business judgment, is it advisable for one pattern company to seek a very large number of agencies in a particular small city, or in a particular section of a large city?
A. No.
Q. 137. Why is that?
A. Well, first is this consideration which, if my experience counts for anything, is important, and, as I say, I have been at it twenty-eight years, that to handle the business satisfactorily to the public and to the distributing agency you must have a complete stock of patterns. We have found it necessary, it is the custom of the business, to protect the agent against loss on unsold patterns. Now, the minute you get to a condition where the number of patterns exchanged grows disproportionate to the number you sell, you handle the business at a loss to yourself, and probably at a loss to the agent. So that it has been our policy, and I think it has been the policy of the companies generally, to place their agencies in such a way that each one will have a reasonable opportunity for an independent business in patterns, a business of such a kind as will make the handling of it profitable for him and profitable for the manufacturer.
Q. 138. Now, with reference to some of these companies that have come up since your company has been doing business under this form of agency contract, the McCall Company is one of them, isn't it?
A. Yes; the present McCall Company came in the business since the Standard Fashion Company began business.
Q. 139. And do you know how many agencies the McCall Company claims to have in the country today?
A. They claim to have twelve thousand. That is the latest thing I have seen.
Q. 140. They claim to be the biggest concern of the kind in the country?
A. They claim to do a bigger pattern business than any other concern and to have more agencies. I have seen them advertise 12,000.
Q. 141. What other concerns have gone into business of any considerable size since your company started?
A. This Home Company came into business in 1905. They claim to have something like five or six thousand agencies.

54 Mr. Sullivan: Mr. Scanlon's testimony is very entertaining and instructive, but we ought not to try this case entirely on newspaper publications.

Mr. Dodge: I wanted him to give us a notion of the comparative size of these companies as they are known in the trade.

The Court: You have got it in now, and you had better shut the door if you have got through.

The Witness: I said I had heard of it, but I have seen the advertisements of the McCall Company and of the other companies.

Mr. Dodge: I did not suppose that you would require me to summon representatives of those other companies here. It is only a minor point. Do you object now to my going any further along this line?

Mr. Sullivan: Yes; I think that something other than the boasts or claims of other companies in the newspapers ought to go in.

The Court: I suppose that Mr. Scanlon knows something, in a general way, about the magnitude of their business.

The Witness: Oh, yes; I travel around the country a great deal. I see them, and I see the reports that our travelers make, and in that way I know about the business of the different agencies. I should accept the McCall Company's claim that they have about 12,000 agencies.

The Court: You know whether they are doing a large business or not, I suppose?

The Witness: I think they are doing a slightly larger business than our company, and they have nearly double the number of agencies.

The Court: You started by asking him what other concerns of any considerable size have gone into the business since his company started.

Mr. Dodge: Yes; I wanted him to name the companies today that are in this business.

The Witness: The Pictorial Company began business within the last twelve or thirteen years, and they do a very considerable business, I have no doubt at all; I know they do, and they have got six or eight thousand agents, I think. The Home Company also
55 came in in 1903, and they claim to have about 5,000 agents, and I believe they have, and they do a very considerable business.

Q. 142. Those are the ones that have sprung up in recent years, are they?

A. Those are the principal ones; yes.

Q. 143. What is the total annual business of your company?

A. Our total annual business runs a little somewhat in excess of a million dollars.

Q. 144. In patterns?

A. No, not in patterns. In patterns it runs half a million to six hundred thousand; that is, our income and net prices.

Q. 145. And the rest of the business is in connection with the magazines and publications. Tell us about some of the considerations that guide you in selecting a particular agent. I wanted to ask you whether or not a store like the Magrane Houston Company's store had advantages over a large department store as an agency for the sale of patterns?

A. In my judgment, the Magrane Houston store, by reason of its reputation as a piece goods store, and its favorable reputation, to my positive knowledge, in Boston as a great piece goods store, is a peculiarly valuable store as an agency for a pattern outfit.

Q. 146. What do you say as to its location?

A. Well, of course, I am not a resident of Boston, but its location seems to me to be the precise centre of the shopping district. I believe that the store carries a sign, "Boston's Busiest Corner," or something of that kind.

Q. 147. Is it, or was it in July last, or is it today, possible for your company to establish any other agency in the vicinity of the retail dry goods district of Boston?

A. I mentioned, addressing his Honor particularly, the fact that the contract that I made with the R. H. White Company precludes our making arrangements with anyone else than the Magrane Houston Company; but, apart from that, having visited the different stores, and having had our representative visit them, I know that they are all parties to contracts that have considerable periods of time to run, and we could not replace the Magrane Houston agency without resorting to the tactics of the McCall Company in getting somebody to make a contract.

56 Q. 148. And I will ask you, subject to his Honor's ruling upon its admissibility, whether you know, as a matter of fact, concerning the existence in the contracts which the other agents or dry goods stores have with the pattern manufacturers of clauses precluding them from handling any other patterns?

Mr. Sullivan: I pray your Honor's judgment.

The Court: That is upon the question of procuring some other retail store to handle the patterns of the plaintiff?

Mr. Sullivan: If your Honor please, these are accessible written contracts, all of them. This is Mr. Dodge's own witness and he is asked to testify as to the contents of a written contract not shown to have been lost or destroyed, and it has not been shown that it is not within their means to summon the production of the contract into court. It seems to me that it would be clearly incompetent.

The Court: If the witness knows the general custom among pattern manufacturing companies with reference to placing such clauses in their contracts, it is that particularly that he is asked to testify to, not what a special contract contains, not any particular contract, that would not be admissible, but the general custom of the trade, if he knows it, he may testify to.

Mr. Dodge: Yes, your Honor.

Q. 149. Do you know the general custom of the trade in that regard?

A. Why, in my capacity as head of my business I have had occasion to see hundreds of contracts which——

Mr. Sullivan: I object to that. That is not responsive.

The Court: The objection is made that the answer is not responsive. I think that the question should be answered directly.

Mr. Dodge: Will you read the question?

[The question is read by the reporter as follows:]

"Q. 149. Do you know the general custom of the trade in that regard?"

A. I do.

Q. 150. With reference to the existence of this clause in the contracts of agency and what the custom of the trade is?

A. The custom of the trade is to require the agent to han-
57 dle exclusively the patterns of the manufacturer with whom that merchant makes his contract.

Q. 151. And that being so, was it in July, or is it today, possible for you to establish anywhere in the retail dry goods district in Boston an agency as good as that of the Magrane Houston Company?

The Court: I don't think that he can testify to that.

Mr. Sullivan: He has already testified that he has eliminated himself from the centre, voluntarily, by contract.

Mr. Dodge: Wholly apart from that.

Mr. Sullivan: Aside from that, it is too speculative a question; it involves the question of the desirability and value of the contract with the Magrane Houston Company, a comparison of that with the possible value of some others that we cannot get at.

Mr. Dodge: Let me withdraw it and put another question.

The Court: If the witness knows, I think that it would be helpful to the Court, and it seems to me admissible, to have him testify, or to furnish information or evidence, as to whether there were other big concerns here that were free to make contracts.

Mr. Dodge: Yes; that is about the form which I had it in mind to put the new question. I will ask you that, Mr. Scanlon.

Q. 152. Were there in July, and are there today, other department stores or dry goods stores in the City of Boston, in the retail dry goods district of Boston, which are, or were, available for the establishment by you of an agency?

A. There was none—not in July, and not today, to my knowledge; there was not.

Q. 153. You said something about two stores in which they were not handling patterns; one was Filene's and one was Stearns'. Now, what have you to say with reference to the possibility of establishing an agency in either of those stores?

A. Why, the Stearns store handled our patterns at one time for several years, and terminated the arrangement regularly, as I recall it, and I don't recall the gentleman's name, but the manager of the business told me that he figured that their class of business was such that their store did not represent a good outlet for patterns, and that they were going out of the pattern business, and he told me
58 that they were not going to handle patterns any more, and they have not.

Q. 154. Do they sell piece goods to any extent?

A. High-priced piece goods; yes.

Q. 155. Do they cater to the class of customers to whom it appeals to buy patterns to make their own clothes?

A. I shouldn't say so.

Q. 156. What have you to say about the Filene store?

A. Mr. Jackson, I think, told me that he would regard patterns as being competitive with their business. They sell ready-to-wear garments, therefore Filene's store wouldn't handle patterns under any conditions.

Q. 157. One other thing I want to ask you with reference to the defendant: Is the defendant's store an old store or a new one?

A. Now, if I am to speak of my own positive knowledge, I should say that it has been there, to my own positive knowledge, twenty-five years about.

Q. 158. As long as you have been connected——

A. It was formerly the Houston store, or Houston & Henderson, and J. B. Henderson, and there are several names that it has been known under.

Q. 159. Now, I am going to ask you this question: What is the value to your company of the right to do business under this form of contract?

Mr. Sullivan: I object to it.

The Court: I do not know that I understand what that means.

Mr. Dodge: I do not wonder, your Honor. It is an unusual form of question, but, in substance, that form of question has been sustained where the jurisdiction of the court is attacked on the ground that the matter involved does not exceed $3,000. Now, what we are seeking here to do, of course, is to establish the validity of these pattern contracts under the Clayton Act. It is not a mere question, so far as that aspect of it is concerned, of litigation with this particular defendant to establish that he has broken this contract.

The Court: But then the only inquiry here is what was the value to you of this contract.

59 Mr. Dodge: Yes, what is the value——

The Court: That is, this particular contract.

Mr. Sullivan: And simply on the question of jurisdiction, and not as a basis for mulcting the defendant in any way.

Mr. Dodge: No. This is simply on the question of the jurisdiction of the court. There is a recent case in the Supreme Court of the United States——

The Court: That is, what is alleged, of course——

Mr. Dodge: It is like the case of the stock exchange quotations, which were leaking out somewhere, and under an action in equity to restrain the defendant from using those quotations the Supreme Court of the United States held that, for the purpose of determining the jurisdictional question, the value of the right of the plaintiff to keep the control over those quotations was a proper question.

The Court: What the plaintiff claims?

Mr. Dodge: Yes, sir; and one of the plaintiff's officers was permitted to testify in that case.

Mr. Noble: He gave his opinion as to the value, and the court said that it was proper.

Mr. Sullivan: What is the case?

Mr. Noble: I will give it to you. It is the case of Hunt v. The New York Cotton Exchange.

The Court: Is there any objection to it if offered for that purpose?

Mr. Sullivan: Not if offered solely for that purpose.

The Court: Then the witness may answer.

[The question is read by the reporter as follows:]

"Q. 159. Now, I am going to ask you this question: What is the value to your company of the right to do business under this form of contract?"

A. The right to do business under that form of contract is worth to us, I should say, several hundred thousand dollars.

Q. 160. Several hundred thousand dollars?

A. Yes. It is a very important part of our business.

Q. 161. Why do you say that?

A. Because, in my judgment, we could not operate properly under any different kind of contract.

60 Q. 162. I have in mind, of course, particularly the requirement that the agent shall not deal in the patterns of others.

A. Yes, and I have stated that I consider that provision of our contract a vital consideration.

The Court: Under this form of contract, I understand?

The Witness: Yes, sir.

Q. 163. Now, Mr. Scanlon, I want to come to the question of the damages, so far as we can show them. Have you with you the books of your company containing the account with this defendant?

A. I have them in my bag, the original ledger pages. I have made an extract from the pages if that would answer the purpose.

Q. 164. Well, I want the book itself, too.

The Witness: Ask Robert if he will open that little black bag of mine.

[Certain papers are passed to the witness, who hands them to Mr. Dodge.]

Q. 165. These are sheets from a loose-leaf ledger system of bookkeeping?

A. Yes; these are from our ledgers.

Q. 166. Those are the original ledger pages containing the account with the Magrane Houston Company?

A. These are the ledger pages covering the whole of our account with the Magrane Houston Company; yes, sir.

Q. 167. And have you made up certain tabulations from those ledger sheets?

A. I have.

Q. 168. The basis for which is entirely in that account which you have before you?

A. Yes.

Q. 169. I want to ask you, in the first instance, whether or not it is possible to show in dollars and cents all of the damage which you claim to have suffered from this alleged breach of contract?

A. I couldn't show it; no.

Q. 170. What features of the damage are there which you couldn't show in dollars and cents?

A. Why, the damage to our reputation is a big item, in my judgment.

Q. 171. What do you mean by that?

A. Why, the damage done us, for instance, by the McCall
61 travelers who are going over the country explaining that the Magrane Houston Company have thrown out our goods in favor of the McCall. It is an invidious kind of thing that you can't put your finger on. I shouldn't know how to calculate the amount of damage, though I have reason to know that it is considerable.

Q. 172. What do you say as to the diversion of the trade in the Magrane Houston's Company's store?

A. Please put it again.

Q. 173. The diversion of trade in the Magrane Houston Company's store to the McCall Company. That is, what I have in mind is this: Can you tell whether or not a person who now goes into the Magrane Houston store and asks for a Standard pattern is told that they do not keep it any longer, but that they have McCall patterns,—whether that person is going to go out and get one of your patterns, or be content with one of the McCall patterns? Of course you can't tell that.

The Court: How can he without knowing the workings of that person's mind?

Mr. Dodge: Of course he can't.

The Court: Can't we form some idea of what a person might do; how a person's mind might work?

Mr. Dodge: I think that it is a matter of argument. I simply wanted to point out, for that very reason,——

The Court: It is a matter of argument, is it not, rather than of evidence?

Mr. Dodge: I think it is; yes, sir.

Q. 174. You can give us, however, the financial results of the period during which the contract was kept, can't you?

A. Oh, yes, of course, because that is a matter of record knowledge.

Q. 175. I observe that the contract itself calls for an original payment of only $500 on account of $1,000 of patterns ordered, the contract providing that the other $500 shall remain as a standing credit until the termination of the contract. Has that $500 been paid to you?

A. No.

Q. 176. That is the outstanding credit?

A. Yes.

The Court: That is, the credit given to the Magrane Houston Company on its books, $500, is still unpaid, you say?

62 Mr. Dodge: Yes, sir. That is, they order $1,000 of patterns at the beginning, and pay in cash only half.

The Court: They were given a credit of $500 on account of goods, and that is under the contract?

Mr. Dodge: Yes, sir.
The Court: And that remains unpaid?
The Witness: That remains unpaid.
Mr. Dodge: That $500 is to remain unpaid as a standing credit, the contract says, during the continuance of this agreement, and to be due and payable on its termination.

Q. 177. On current account, for goods supplied, was there an indebtedness which remains unpaid?
A. Yes.
Q. 178. How much was that?
A. Three hundred and some odd dollars. I don't seem to have the precise amount here.
Q. 179. I think the ledger shows it.
A. It is on the ledger sheet there; yes. It would be on the last sheet.
Q. 180. We will look that up in the ledger. I want to ask you now whether or not you have the statistics from the books of the total business done with the defendant up to July 9, 1917?
A. Yes, I have those figures.
Q. 181. What was the total number, or total amount, in dollars and cents, of patterns purchased from you by the defendant?
A. The total was $6,199.80.
Q. 182. How much?
A. $6,199.80.
The Court: That was for all the time of the contract, from the beginning until they claim to have terminated it?
The Witness: Yes.
Q. 183. Does that include a certain amount of patterns that you sent in exchange for patterns that were returned?
A. Yes. Of that amount there was $1,578.83 that was furnished in exchange.
Q. 184. That means that you took the old patterns back at ninety per cent of their original cost and supplied the new patterns?
A. Yes, supplied new patterns, and credit allowed for out of date patterns, the new patterns so supplied amounting to $1,578.83. That is included in the $6,199.80.
Q. 185. What was the total sum paid you for fashion sheets,
63 or charged to the defendant for fashion sheets?
A. In dollars and cents, $1,672.50.
Q. 186. And publications of other sorts?
A. $1,773.73.
Q. 187. And that made gross receipts from the defendant, or gross amounts charged to the defendant, in so far as they have not been paid, of what?
A. $9,746.03.
Q. 188. Now, to go back for a moment to the question of the amount paid on current account at the termination of the contract, and still unpaid, does that ledger page enable you to give us the exact figure?
A. Yes. There appears to be a debit balance for current purchases of $311.69 that is unpaid.

Q. 189. $311.69?

A. Yes.

Q. 190. Have you computed the average monthly figures for the business actually done with the defendant during the time that the contract was performed by it?

A. I have.

Q. 191. You have?

A. Yes.

Q. 192. How many months did the contract continue in existence,—continue to be performed?

A. They operated under the contract 29⅓ months.

Q. 193. Have you figured the average business per month, gross and net?

A. Yes. That amounted to about $3,960 for a year. That would be $330 a month.

Q. 194. That was the gross receipts, was it?

A. Gross receipts. It was $330.34, to give the exact figure.

Q. 195. Was that on patterns or on everything?

A. That is on everything.

Q. 196. Now, have you determined the profit on that business?

A. I have in a general way; yes.

Q. 197. And that amounted to what?

A. That amounted to $3,798.46. On the business done, do you mean?

Q. 198. You were giving us monthly averages now, weren't you?

A. I gave you the amount of the business, the average amount of the business done with them, during the period during which they operated under the contract.

Q. 199. Yes. Now, how did you figure the profit?

A. I figured the profit on the business they would have
64 done for the balance of the term of the contract, using the showing made by them while they did operate as a basis.

The Court: Can't you supply us now, following out the line of testimony which he has given—he has given the business per month done with the defendant, and you inquired as to the profit on that business, I understand?

Mr. Dodge: Yes.

Q. 200. Have you figured that?

A. The profit on the business actually done, which they had paid us?

Q. 201. Yes?

A. No, I haven't done that.

Q. 202. But you say that a certain——

Mr. Noble: Can't you calculate it from what you have got in?

The Witness: Oh, I could do it in a very little while, if it is required.

Mr. Dodge: I was going to inquire into the figures that you have got, and then come back to that, if it seems important.

Mr. Sullivan: Shouldn't we have the profits on what they had done, rather than the profits on what they might have done?

The Court: That would be the proper thing, to my mind. I suppose that the future must be predicated upon the past, and the future profits must be predicated upon the past profits, and that is why I called attention to the fact that we have not had the past profits.

Mr. Dodge: The witness has evidently figured the estimated profits for the future upon some basis, which I was going to ask him now to explain to us.

The Court: Is there any objection to taking this testimony, with the assurance that the other will be furnished?

Mr. Sullivan: No, sir.

The Court: Then proceed.

Mr. Dodge: Why not let him figure it now?

Mr. Noble: I think he is figuring it now, if your Honor please.

Mr. Sheehan: He has got all the items there now from which he can figure the profits.

65 The Witness: During the term which they operated under the contract the amount of goods sold was $6,787.84, which represented 47,509 individual patterns, on which our profit was $2,612.99.

Q. 203. As to the fashion sheets and publications?

A. Yes, as to the fashion sheets. I will give you that in a second. For fashion sheets they paid us during the term that they operated $1,672.50, on which our profit was $669.

Q. 204. Now, there remained only the other publications.

A. Yes, $1,773.73. That is made up of the Quarterly and the Designer. The margin of profit on them is not considerable. Now, I should have to take into the calculation on that the redemption of the coupons from the Quarterly, which affects our profit. That affects our profit on the publication. I would have to go into that. On the whole $1,773.73 I should say that the profit was not more than a couple of hundred dollars on that.

Q. 205. Now, in your figures for the unexpired term of the contract you took 19¾ months?

A. Yes.

The Court: Let me get clearly in my mind what you claim. The total that you claim, while the contract was in force, $2,612.99, is that profit on fashions?

The Witness: On patterns; and $669 on fashion sheets.

The Court: And then on your Quarterly and other publications you estimate about $200.

The Witness: About $200 on the $1,773.73.

The Court: And that represents the total profits during the term of the contract?

The Witness: The total profit on the contract for the term they carried it.

Q. 206. And that is how much?

A. $3,481.99.

Q. 207. You then computed, from your figures, the profit that might have been made during the remaining 19¾ months of the business at the same rate?

A. On the same dollars and cents basis, but taking into account the increased price of the patterns; that is, I estimated the number of patterns that the same amount of dollars and cents would represent.

Q. 208. That is, you assumed that they would sell the same
66 amount of patterns per month?

A. Assuming that they would sell the same amount of patterns——

Q. 209. And take the same amount of publications and advertising matter?

A. Yes. Well, that would be the case under the contract.

Q. 210. Now, with regard to the amount of patterns sold, is it your experience that the number increases or diminishes as the agent's contract goes on, as time goes on?

A. It has been my experience that agencies generally increase their business as they go along.

Q. 211. Should you say that it would be conservative to assume only the same amount of business for the balance of the contract period?

A. That would be my judgment, that that would be a conservative estimate.

Q. 212. In the figures which you prepared in arriving at that amount, you say that you took the number of patterns that the same amount of money would represent, but you say you took the advanced price of patterns. How much had the price of patterns advanced?

A. About 30 per cent.

Q. 213. When was that?

A. Well, the first advance was made in the summer of last year, and there were several other advances that have been made since then.

Q. 214. What has been the cause of those advances?

A. Oh, we had increased cost of material and everything.

Q. 215. That is, the war conditions generally?

A. The war conditions I have heard blamed for it; whatever conditions may be responsible for it, the fact remains that the raw material, paper and everything that goes into the business, have gone up enormously, and we increased the prices for that reason.

Q. 216. Now, will you tell us what the figures are for those 19¾ months, taking as the basis of this calculation a pattern?

A. The sales at retail are $6,787.84 in 29¼ months, and figuring at 7 patterns to the dollar, which was right, in my judgment, during that term, it appears that they sold 47,515 individual patterns, or at the rate of an average of 1,638 patterns per month. At current prices
67 now, which make the patterns run about 5 to the dollar, their sales of individual patterns for the remainder of the term of the contract, 19¾ months, would be 32,214 patterns, the retail price of which would be $6,443, and for which we would receive $3,221.50. The cost of these patterns would be $644, leaving our profits on these estimated sales for the remaining 19¾ months $2,587.22. That is the estimated profit on the pattern sales for the balance of the contract.

Q. 217. How about your magazines and fashion books?

A. I have got those here. They sold during the 29¾ months they operated 6,785 fashion books, or at the rate of 234 a month. This would make an estimated sale for the remainder of the term of 4,602 copies. Our records show that they redeemed the pattern coupons in 85 per cent of their sales. On those books we made no profit, I couldn't figure any profit on those, and that would leave 691 copies of the fashion book which they sold, and in connection with which we didn't have to furnish a pattern, and on those copies our profit was seven cents a copy, or $48.37. During the time they operated they sold 1,542 Designers, an average of 53 a month. For the remaining term that would make the sales of the Designer 1,042, on which I estimate that our profit would be about two cents a copy, making a profit of $20.84. Of the fashion sheets they were to take for the balance of the contract term 115,000, at the agreed price of $862.50. Our profit on these fashion sheets is $2.97¼ per thousand, so that our profit on these 115,000 fashion sheets would be $330.34. These estimated profits, with the balance owing on the original stock purchase and the current purchases——

The Court: Give us the total first.

The Witness: $3,798.46.

Q. 218. But that includes the standing credit of $500?

A. Yes, that includes this unpaid balance on the original stock purchased.

Q. 219. And the $311.69?

The Court: Let us know what those items are. The $500 and the $311.69 are what?

The Witness: The $500 is the unpaid balance on the original stock, and the $311.69 is for the current purchases during the last month or so that they had the agency.

68 The Court: There are those two amounts, $500 and $311.69?

The Witness: Yes.

The Court: So this sum of $3,798.46 includes——

The Witness: Includes those two amounts, making $811.69.

Mr. Sheehan: Which, if I may interrupt, I will say I have figured up, and the profit is $2,986.77, which, together with the $811.69, makes the total of $3,798.46.

Q. 220. There is one other element to be considered, and that is the value of the stock of patterns on hand. Now, when the contract rightfully comes to an end it obliges you to take back the patterns remaining in the agent's hands at 75 per cent of the cost, does it not?

A. The contract requires the agent to return the patterns to us, and requires us to purchase them at 75 per cent of the amount.

Q. 221. And to credit them on the account?

A. Credit them on the account against any indebtedness that there may be.

Q. 222. I understand that there is some question as to whether these patterns have been returned in this case, or accepted by you. What was the fact in regard to that?

A. The patterns were returned. We took them in and notified them that we were holding them subject to their order.

The Court: There has been no credit, then.

The Witness: We haven't passed any credit.

Q. 223. What was the amount to be if they were entitled to the credit?

A. $788.73.

Mr. Dodge: That is all.

The Court: Just give me that figure again, if you please.

The Witness: The credit they would receive is $788.73. That is based on their bill of the patterns to us, which, of course, would be subject to verification by count. They billed us with $1,051.63, and if that is correct the credit would be $788.73.

Mr. Dodge: That is all.

Cross-examination.

(By Mr. Sullivan:)

X Q. 224. What was the date, Mr. Scanlon, of the contract with the R. H. White Company?

A. The date on which it was executed?

69 X Q. 225. Yes.

A. I think some time in February. I don't know that I——

X Q. 226. February of this year?

A. Oh, I can give you the exact date, sir [proceeding to refer to a paper]. February 7, 1917.

X Q. 227. May I see that? Or I won't take it at this moment. And that is the contract that you have referred to as containing a clause that prevented you from taking any more agencies within a certain distance of it, is it?

A. That is the contract; yes.

X Q. 228. Had you received any notice at that time from this defendant of any intention to give up its contract?

A. None whatever; no.

X Q. 229. The first notice you got from this defendant was contained in the letter that Mr. Dodge has introduced?

A. Yes.

X Q. 230. That is, there was no dicker, no oral dicker, between the defendant and anyone entitled to represent you?

A. None at all. We had, I think, in January, an inquiry from the Magrane Houston Company for a copy of the contract.

X Q. 231. Not at all, is your answer,—no dicker at all?

A. No dicker; no.

X Q. 232. Did Mr. Marsh ever say anything to you that would indicate that they thought that they had a right to give up their contract?

A. Are you speaking of prior to February, 1917?

X Q. 233. Prior to the letter that has been read here formally notifying you that they had given it up?

A. Which letter are you referring to now, the one of March or the one of April?

X Q. 234. The one of April 7.

A. Only the letter of March 17, was it?

X Q. 235. There was no oral communication prior to March 21 of any nature to you?

A. None.

X Q. 236. You are apparently in active control of the plaintiff's business?

A. Quite actively in control.

X Q. 237. You have your finger on things there pretty definitely, haven't you?

A. I think so; yes, sir.

X Q. 238. You are there nearly all the time, or in touch with its business all the time?

A. Yes.

X Q. 239. And you didn't hear anything until the letter
70 of March 21 indicative of an intention on the part of the defendant to avail itself of what it thought was its rights?

A. Nothing except what I attempted to mention, a request in January for a copy of the contract.

X Q. 240. Had you begun to dicker with the R. H. White Company before you got that inquiry?

A. No.

X Q. 241. So that you got an inquiry in some form for a copy of the contract. Was that inquiry in the form of a letter?

A. Yes.

X Q. 242. You got a letter asking for a copy of the contract, did you?

A. I think that Mr. Marsh wrote me about it, or the letter came direct from them.

X Q. 243. And then you began to fortify yourself in that locality?

A. No.

X Q. 244. At any rate, if it is merely a coincidence, it is a fact that on getting a letter in January, asking about the contract, you began to dicker with the R. H. White Company?

A. No. The fact of the matter is that I had completed an understanding with the R. H. White Company two years before that for the restoration of our goods to their store.

X Q. 245. When?

A. The summer of 1915.

X Q. 246. A written agreement?

A. Why, no. We got along to this point——

X Q. 247. No is the answer, is it?

A. Yes.

X Q. 248. Was there a written agreement, a writing?

A. No.

X Q. 249. So that you did take up—did you personally take up the negotiations with the R. H. White people?

A. I took them up myself; yes, sir.

X Q. 250. Came on to Boston?

A. Yes.

X Q. 251. You have been in Boston a great deal in your business life?

A. I don't know what you would call "a great deal". I have been here a number of times; yes, sir.

X Q. 252. So that you have been familiar with the business section, thoroughly familiar with it?

A. I should say so, the dry goods section.

X Q. 253. And did your taking up with the R. H. White people the matter of a contract have anything to do with the feeling
71 that the defendant was going to give up its contract?

A. It had no relation to it whatever.

X Q. 254. Did you give the defendant any notice or statement that you were going to do business with a competitor?

A. Are you speaking of January, or of any prior time?

X Q. 255. In January.

A. In January I had nothing to do with the Magrane Houston Company. At that time I didn't have anything to do with them.

X Q. 256. Then the answer is that you didn't in any way apprise the defendant that you were going to enter into a contract with the R. H. White people, is it?

A. The answer is that in January we did not.

X Q. 257. When did you?

A. When we made the contract with the Magrane Houston Company we told them that we would reserve the right to place our goods with anyone who wanted them.

X Q. 258. Who made that statement?

A. Mr. Kelly.

The Court: Strike that out.

X Q. 259. Did you personally, with anybody representing the defendant, discuss the matter of any other representative for your company in competition with them?

A. I personally, no.

X Q. 260. You, then, had nothing to do with the making of this agreement personally, other than taking reports from your accredited agent?

A. The agreement with the Magrane Houston Company, do you mean?

X Q. 261. Yes.

A. None. That is right.

X Q. 262. And at that time, when the agreement was entered into in November of 1914, how long had this form of contract been in existence and in use by you?

A. It had been substantially the same for a great many years, I should say.

X Q. 263. Substantially the same. How long had it been identical with this form?

A. In 1914? Several years, I should say.

X Q. 264. How many years?
A. Maybe two or three, or something of that kind.
X Q. 265. Pardon me?
A. Maybe two or three years; something of that kind.
X Q. 266. So that this is a contract which in this identical
72 form was in existence before the passage of this act which you have heard read, before 1914, is it?
A. Yes.
X Q. 267. And in the form of contract which was in use prior to this one the use of this vital term here was different, was it not, the phraseology?
A. No, the phraseology was precisely the same.
X Q. 268. Was the phraseology with reference to the term of the contract the same as the printed matter here?
A. With regard to the term of the contract, it carried a renewal from year to year, instead of from term to term.
X Q. 269. Yes. So that in making over the contract, instead of making it a definite time, you introduced general words, from term to term, did you?
A. That was one of the changes in that contract.
X Q. 270. That was the big change, wasn't it?
A. I couldn't say positively. There may have been other minor changes; I don't recall.
X Q. 271. At the time you made this contract with the Magrane people you say the Houghton & Dutton people had your patterns, do you?
A. Yes; they had them in 1914; yes.
X Q. 272. Of course your knowledge of conditions in Boston made it clear to you that they in no way competed with the Magrane Houston Company, didn't it?
A. I don't know how far I would go with you on that.
X Q. 273. Wouldn't you substantially agree with me that, both as to location and character of goods sold, there was very little or no competition between those two stores?
A. No, I wouldn't go as far as that. I should say that there is competition between all the stores in the down-town section, more or less.

Mr. Sullivan: Is your Honor familiar with the locus here?
The Court: In a general way.

X Q. 274. You know that the Houghton & Dutton store can't be said to be in the dry goods section, don't you?
A. Yes.
X Q. 275. What?
A. Well, it depends. I have always regarded—I myself have always regarded the Houghton & Dutton Company as in-
73 cluded in the general down-town section of Boston, in the shopping centre.
X Q. 276. It is practically the last one on the north, isn't it?
A. Yes, practically the last one on the north.

X Q. 277. And it is a store that goes in for a much cheaper line than the Magrane Houston Company, do you think?

A. In my judgment, it caters to a cheaper trade.

X Q. 278. It has a creamery, and a grocery department and so on, and various other things of that sort in its establishment?

A. Quite so.

X Q. 279. It is quite a different sort of store, isn't it, to be fair about it?

A. It differs in the respects that you have mentioned.

X Q. 280. And in the general estimation in which it is held in the trade, in its standing, it is different?

A. The estimation of what trade?

X Q. 281. In your trade.

A. Yes, it is different.

X Q. 282. Now, the only other place that you had at the time that the Magrane Houston Company took the agency was a sales-room of your own?

A. Yes.

X Q. 283. Was that on the ground floor?

A. That was on the ground floor in Mr. Grosberg's store.

X Q. 284. In whose store?

A. Grosberg's.

X Q. 285. What number on Washington Street was that?

A. It was in the block there——

Mr. Sheehan: No. 484.

The Witness: There is one block there occupied by small stores, between Jordan & Marsh's store and R. H. White's, and it was in that block on that side of the street.

X Q. 286. And what kind of a store was it?

A. A specialty shop.

X Q. 287. A one-room store, was it?

A. Yes, a one-room store.

X Q. 288. Of course a very small store compared to this defendant's?

A. Yes; it was only perhaps fifty or sixty feet wide.

X Q. 289. Not in the same class at all, I suppose we can agree?

A. I don't know. They may have handled a number of lines that the Magrane Houston Company handled.

74 X Q. 290. Did they handle what are known as yard goods at all, to your knowledge?

A. I think not.

X Q. 291. I understand that one of the reasons why this contract was so valuable was because this defendant handled yard goods,—was that it?

A. That would make the connection a better one. I wouldn't say that it would be——

X Q. 292. Did you say that that was one of the reasons why it was of great value,—because they sold what you called piece goods?

A. I am trying to make a distinction——

X Q. 293. Did you say that?

A. Will you repeat the question?

X Q. 294. Did you say to Mr. Dodge that one of the reasons that made this contract of peculiar value—I think that was the word—was that this defendant sold a great deal of piece goods? The question is just did you say it?

A. Could you ask the stenographer to refresh my memory on the exact wording? It was something to that effect. If you want me to say that I used those precise words, I would like to refresh my memory on it.

X Q. 295. That was the idea that you meant to convey, wasn't it?

A. A place where piece goods are sold is a valuable connection for an agency; yes.

X Q. 296. And the Magrane Houston store was such a store, you said?

A. Yes; surely.

X Q. 297. And you said that the reason why Stearns did not have patterns was that they did not do that sort of business?

A. No; that they did not cater to people who made their own clothes to any great extent.

X Q. 298. Of course you know that Stearns does a much larger yard business, or piece business, than this defendant, don't you?

A. I don't know that that is so.

X Q. 299. Wasn't it part of your business to know about some of these details, in determining whether you should get patterns in there or not?

A. If you will refer to my testimony, you will get exactly what I knew, or claimed to know, about it in that regard. I say that I had it from the management of the Stearns store that they wouldn't handle patterns again.

X Q. 300. When was that?

A. Six years ago, probably.

75 X Q. 301. Now, I understand, as nearly as I can grasp it, Mr. Scanlon, that it is not advisable to have very many agencies in one locality, for the manufacturer or for the merchant; is that your idea?

A. That depends entirely on the capacity of the locality for developing a pattern business. In one community, for instance, one agency would be ample; in another community, five or six might be justifiable and be profitable.

X Q. 302. As a generalization is that true?

A. Repeat the question, please.

X Q. 303. That it is not advisable to have many agencies in the same locality?

A. Well, I can't admit that absolutely, because, as I say, it depends on the locality and the prospects of business in that locality.

X Q. 304. So that, suppose you could have agencies, as you call them, in all the stores in that down-town district of Boston, would it be advisable?

A. No; I wouldn't put agencies in all the stores; no.

X Q. 305. Then you don't want agencies in very many stores, do you?

A. Why, the thing is fixed clearly enough——

X Q. 306. In the same district.

A. In the same district, as I say, we want as many agencies as we can handle profitably for the business that that section yields.

X Q. 307. Well, sticking to this particular district, there is a limit to the number of stores there that you would want to put agencies into, isn't there?

A. If it is permissible for me to state this, I would say that three agencies in the down-town section of Boston would be all that any manufacturer would want.

X Q. 308. And somewhat scattered around?

A. That would depend.

X Q. 309. Is it an advantage to have them scattered? Can you generalize without giving your reasons?

A. No, because there are two factors that enter into the proper answer to that question.

X Q. 310. Then would it be advantageous to you to have more than one agency?

A. It would be advantageous to us.

X Q. 311. Conceivably you might do as much business in one as in two?

A. No; not in this situation.

76 X Q. 312. Have you looked up the R. H. White Company's business since we gave up our contract?

A. Yes.

X Q. 313. What?

A. Yes.

X Q. 314. Have you got the figures which show whether they have increased or decreased the business?

A. As compared with yours?

X Q. 315. No; as compared with what they were doing before we gave up the agency.

A. I haven't the figures just now, but I recall them in a general way, and I should say that for the first few months they were under the previous sales, and for the last month or two they were above; that is, they were gradually increasing their business.

X Q. 316. Have you the figures here which show what the R. H. White Company did as your agent from the beginning until now?

A. This year, do you mean?

X Q. 317. Yes.

A. No, I haven't got them with me.

X Q. 318. Can you tell us whether the R. H. White Company's sales increased when we gave up our agency?

A. Well, the R. H. White Company——

X Q. 319. No. Can you tell me, yes or no?

A. The R. H. White Company began only at about the time that the Magrane Houston Company gave up their agency. The R. H. White Company began June 1 and you quit July 7, so that I couldn't see any relation between them—the figures would not be important.

X Q. 320. Then the R. H. White agency was a substitution for the Magrane Houston agency?

A. No; in no sense.

X Q. 321. But it synchronized with the giving up of the other contract as an accident?

A. No.

X Q. 322. Well, did they have a pattern in there before you put yours in there?

A. Yes, sir.

X Q. 323. What pattern?

A. The Pictorial.

X Q. 324. Did they have a contract with them?

A. I suppose they did. I never saw it. I have been told they did by the general manager.

X Q. 325. That is all that you have been telling us about these other contracts, isn't it, what other people told you?

77 The Court: We will suspend here until two o'clock.

X Q. 326. Did you discontinue, Mr. Scanlon, the sales place that you had in Grosberg's when you took on the contract with the defendant?

A. Not immediately.

X Q. 327. How soon afterwards?

A. Some months afterwards, as I remember.

X Q. 328. How long, do you remember, definitely?

A. I wouldn't attempt to state it definitely, but I should say five or six months, perhaps.

X Q. 329. Have you any idea what the sales in the Grosberg place were?

A. My best recollection is that they were four or five thousand dollars a year.

X Q. 330. So that was it, under an agreement with the Magrane Houston people that you discontinued the Grosberg place?

A. No.

X Q. 331. Was it because you found that the Magrane Houston people could adequately supply your trade in that vicinity?

A. No.

X Q. 332. What?

A. No, it was not that.

X Q. 333. What was the reason?

A. Why, the reason was that the Grosberg arrangement carried a renewal from year to year, and at that time——

Mr. Noble: Of a lease, do you mean?

The Witness: Yes. My understanding was that the lease was renewed from year to year if we didn't terminate it, and we renewed it some time in the spring of the year, because I had every expectation at that time of putting our goods back into R. H. White's that summer.

X Q. 334. That is, the summer of two years ago?

A. Two years ago; yes. I guess it was the summer of 1915.

X Q. 335. So there was no relation of any kind between the ending of the Grosberg and the beginning of the Magrane arrangement?

A. None whatever, Mr. Sullivan.

X Q. 336. I noticed that when you came here today you didn't have figured what your past profits had been, did you?

A. On the Magrane Houston Company business?

X Q. 337. Yes.

A. No, I hadn't done so. I did it roughly.

78 X Q. 338. Have you got the memoranda here?

A. Yes, I think so.

X Q. 339. Will you let me see how you arrived at that?

A. It is in my little bag there. I have got it summarized on this. These are the memoranda [passing several papers to Mr. Sullivan]. The pages are arranged in sequence. This is the first page.

X Q. 340. Well, the net result on that page is merely to get at what your receipts would be?

A. The estimated sales and profits for the balance of the time.

X Q. 341. Take this page; I will call your attention to that. That memorandum finally evolved, down at the bottom, what your receipts would be, didn't it, your gross receipts?

A. What the gross receipts would be, or were, I think.

X Q. 342. Were; yes.

A. Yes. This shows our actual sales to have been $6,787.84.

X Q. 343. There is nothing on this sheet, then, to show how you arrived at your profits, other than your foundation for them by showing the receipts?

A. I have got the data here,—$6,787.84, at seven patterns to the dollar; 47,000; profit on each, 5½ cents per pattern.

X Q. 344. That is your standard profit on each pattern, your routine profit?

A. Yes.

X Q. 345. What does it sell at?

A. It sells at 15 cents retail, 7½ cents to the merchant, to the agent.

X Q. 346. The pattern sells at 7½ cents from you to the merchant?

A. Yes, sir.

X Q. 347. And all but two cents of that is profit?

A. Yes; in the ordinary case, such as this; yes.

X Q. 348. Well, what is it in the extraordinary case?

A. It might differ in the extent that you——

X Q. 349. Somebody would begin to owe you money besides the retail office, wouldn't they, pretty soon? You get all but two cents now in the ordinary case?

A. Yes, sir; that is on the patterns sold to the public, you understand.

X Q. 350. On all that are sold to the public?

79 A. Sold to the public; yes. There is an element of exchange, you understand, in the thing, too, that you must figure on.

X Q. 351. Well, how do you arrive at that 5½ cents, is what I would like to get at.

A. The average pattern was sold at 7½ cents, and the average cost of it, manufacturing cost, was two cents.

X Q. 352. The manufacturing cost of the patterns that are sold?

A. Yes; two cents.

X Q. 353. Of the patterns that are sold?

A. Yes; surely.

X Q. 354. That doesn't show to your stockholders, does it, a 5½ cent net profit on each pattern?

A. We have never made any statement in just that way, so much profit on each pattern; no.

X Q. 355. But do you mean to say to the court that you make 5½ cents on a pattern after taking out losses and everything else?

A. No; there is no overhead in that; that is taking out simply the manufacturing cost.

X Q. 356. Just the bare manufacturing cost?

A. The paper and the labor and the material that goes into the pattern itself.

X Q. 357. So that there is nothing else other than what you have enumerated in that two cents?

A. That is all,—what we call the factory cost.

X Q. 358. No office?

A. No office; no.

X Q. 359. Or legal, or any of the overhead charges at all?

A. None of the overhead.

X Q. 360. And that is the way that you figure all these profits, is it, past and prospective?

A. In this case?

X Q. 361. Yes.

A. Yes, sir.

X Q. 362. That is, you figure that the net profits—or the loss that you sustained by not having this contract carried out should be determined by the difference between the mere manufacturing cost and the selling price from you to the merchant?

A. That is my interpretation of how it should be figured.

X Q. 363. You don't make any allowance for any diminution in your other expense because you are not doing business with the Magrane Houston Company now?

A. I don't believe that there is any diminution or accretion
80 of expense because of the loss in our overhead—because of our not doing business with the Magrane Houston Company; practically, no.

X Q. 364. Without talking "practically" for the minute, technically and actually there should be, shouldn't there?

A. I don't think I could figure it out. The cessation of the Magrane Houston Company's business I shouldn't say represented a cent's worth of increase in the overhead to us. It would represent the non-use of so much paper, and the non-use of so much labor in making the patterns that the Magrane Houston Company would have sold. That was my basis.

X Q. 365. So that you haven't attempted to figure anything into the cost of the patterns that you would have sold us under your agreement, other than the factory cost?

A. The factory cost.

X Q. 366. That is all?

A. Yes, sir.

X Q. 367. Well, now, you say that you are thoroughly familiar with the business?

A. I have been twenty-eight years in it.

X Q. 368. Yes. And such familiarity as your position and years of experience give you, you concede that you have got, I suppose?

A. I admit that; yes.

X Q. 369. And you know, apparently, by repute at least, something about the other companies?

A. Yes, sir.

X Q. 370. And I understood you to say that competition was bitter?

A. In the pattern business?

X Q. 371. Yes.

A. I should say it was extremely bitter; yes, sir.

X Q. 372. And has been all along during the time of the existence of this contract?

A. Yes; quite so.

X Q. 373. Substantially the same situation has existed?

A. Yes.

X Q. 374. And does now?

A. Yes; quite so.

X Q. 375. Well, you figure a good deal by per cents, I suppose, as a business man, in estimating your profit?

A. I don't know that I followed you with reference to that.

X Q. 376. You figure upon a percentage basis a good deal, don't you?

A. Percentage how? Will you make it clearer?

X Q. 377. Can't you tell, for instance, what percentage of the amount sold by you to a customer is profit?

A. To a given particular customer, you mean?

81 X Q. 378. Well, was there anything odd or unique about the Magrane Houston contract?

A. Nothing at all.

X Q. 379. I understood that it was routine?

A. Absolutely; yes, sir.

X Q. 380. And the conditions were routine attending its carrying out, weren't they?

A. Absolutely.

X Q. 381. Now, can't you tell, in the carrying on of your business, what a gross sale of three or four thousand dollars' worth of patterns would net you in profits, in percentage?

A. Not absolutely, because it is affected very materially by the extent of the exchanges.

X Q. 382. Well, you mean because they return things to you?

A. Yes.

X Q. 383. And that cuts down the profits?

A. May I illustrate? For instance, if we send a pattern to a merchant, sell it to him at a price of 7½ cents, and he does not sell it, he returns it to us at a loss of a fraction of a cent, and we replace that pattern, so that for the second pattern, instead of getting 7½ cents we get a fraction of a cent, and if he does not succeed in selling that pattern we exchange it, so that we may have supplied three patterns in a given case for 8½ cents. The element of the exchange has a

vital bearing on the profits in any given case, so that we would have to take the exact figures in each case and see what our sales were and what the ratio of the exchange was.

X Q. 384. Can't you tell the court, for instance, when there are $3,200 of sales to this company, what your percentage of profit was?

A. Thirty-two hundred? That is the amount that we received from the Magrane Houston Company?

X Q. 385. Yes. Well, without doing it, if I don't interrupt, I want to know if there was not a rule in your business, as a result of all these years of experience—didn't you have some idea that you could give the court of the percentage of the selling price that would be net profit,—some handy rule?

A. No; we had no such rule, Mr. Sullivan.

X Q. 386. Have you the percentage that the overhead would be, and the other elements of cost in a 7½-cent pattern, besides the factory?

A. No, I haven't anything accurate.

82 X Q. 387. How is it that you are accurate about the factory? Because it is easier?

A. Because it is easier. So many patterns come out of a ream of paper, and you know what it costs to cut them and fold them and put them together.

X Q. 388. That has been determined?

A. That has been a matter of exact determination.

X Q. 389. Do you mean to say that your business has been conducted without any definite understanding among those in authority as to what the percentage of profit on the sales is?

A. Yes; that is quite so.

X Q. 390. Well, is it because there is not any?

A. I don't know that it is because there is not any. There may be some basis for it.

X Q. 391. Have you been making money?

A. We have made quite a little money.

X Q. 392. Have you been affected adversely by the conditions that you have adverted to with reference to prices?

A. War conditions, do you mean?

X Q. 393. Yes.

A. Oh, yes, very seriously.

X Q. 394. Has that cut down your profits?

A. I would say that it has up to date. The thing is in a state of transition just now.

X Q. 395. Now, then, isn't there any way that you can tell the court, without my putting in too much time on this, what the percentage that you earn on your sales is?

A. You see, Mr. Sullivan,——

X Q. 396. Just tell me if there is not some way.

A. I don't know of any. I wouldn't know how to distribute the overhead, because of the publications, as well as the patterns, entering into it, you see.

X Q. 397. You are president and a director?

A. Yes, sir.

X Q. 398. You have to decide at some stage what you will let the stockholders in on, don't you?

A. What?

X Q. 399. How much will you let the stockholders in on the profits,—don't you have to decide that?

A. How much we will let them in on *them*?

83 X Q. 400. Yes.

A. Exactly what do you mean?

X Q. 401. How much dividends you will give them.

A. Oh, that is done by the directors, not by me alone.

X Q. 402. You are a director?

A. Yes.

X Q. 403. And the chief director at the meetings?

A. Yes, sir.

X Q. 404. Don't you have to decide what the profit has been?

A. Yes.

X Q. 405. Don't the bookkeepers furnish you with a statement of what ratio that bears to sales?

A. No, nothing precisely of that nature.

X Q. 406. Do you mean to say that you don't have a statement that shows that?.

A. Nothing that shows the percentage, the ratio of profits to sales.

X Q. 407. Haven't you any idea of the ratio of profits, so that we could use it as a standard?

A. I have not, Mr. Sullivan.

X Q. 408. You would concede, I take it, that the McCall people have as good an organization as yours for making money?

A. I should have no objection to conceding that.

X Q. 409. Their business, you say, is practically identical with yours?

A. Larger, I said.

X Q. 410. Larger; but I mean in character.

A. Yes, much the same.

X Q. 411. Much the same. You wouldn't expect to find any great variation between their percentage of profits and yours?

A. Yes, I would.

X Q. 412. The competition that you have said is so bitter to a certain extent takes care of the margin of profits, doesn't it? That is possible?

A. The competition, speaking from my standpoint, does not take care of the marginal profits. I think that it disrupts the margin of profits considerably.

X Q. 413. Well, I didn't mean that it conserved them at all, but I meant that it took care of how much you could get; it kept down the margin of profit, didn't it?

A. Oh, competition affects that; yes.

X Q. 414. And you were each competing with the other?

A. Yes.

84 X Q. 415. And competing especially on price?

A. Price to the merchant, or the retail price?

X Q. 416. To the merchant.

A. Yes.

X Q. 417. So that we might expect to find considerable identity of price between the two concerns?

A. Sales price?

X Q. 418. Yes.

A. Yes, that is so.

X Q. 419. Isn't it well known to you and to the trade at large that no pattern company can figure over 10 per cent as profit on what it sells?

A. No, that is not known to me.

X Q. 420. What?

A. That is not known to me.

X Q. 421. You have some knowledge on the subject, haven't you, of what competitors are probably making?

A. Yes; I have seen the statement that the McCall Company averaged to take out of their business $600,000 a year for five years, which I should say is vastly more than 10 per cent.

X Q. 422. You have to make up reports to the State?

A. Yes.

X Q. 423. And you make up your gross sales?

A. Yes.

X Q. 424. And show your net profits?

A. Yes.

X Q. 425. It can't be that the ratio between those two has escaped your attention?

A. The ratio between what?

X Q. 426. Between your profits and gross sales for the year.

A. I haven't anything sufficiently in my mind to enable me to make any statement on that.

X Q. 427. Didn't it occur to you that you would probably be asked some such series of questions as those which I have asked?

A. It did not.

X Q. 428. Didn't it occur to you that that might be a fair way to charge up to this defendant what you had lost if it turned out that you had lost anything?

A. No, it did not. This occurred to me to be the fair way to figure it.

X Q. 429. But you hadn't done even that until you got here?

A. I haven't figured the profit on what they had sold. I figured the profit on what they would have sold.

X Q. 430. How did you get at it except on the basis of experience?

85 A. This was simple. I took the actual cost of the patterns, the actual cost of the paper, the printing of the fashion sheets, and so on—it was very simple.

X Q. 431. Last year what were your sales?

A. Something over a million dollars.

X Q. 432. That is, what the merchants returned to you, I mean.

A. Those were the total sales, including pattern receipts, publication recepits, and everything.

X Q. 433. That was the cash returned to you?

A. Returned to us.

X Q. 434. Now, what were your profits?

A. We made no profits last year.

X Q. 435. That was lucky. That was 1916?

A. 1916.

X Q. 436. But you still think that there was a profit in the Magrane Houston agency last year?

A. Last year; yes, I should say there was a profit in the Magrane Houston Company agency individually; yes.

X Q. 437. Were you a loser last year?

A. We lost a little money last year.

X Q. 438. Was that due to any causes that entered into the dealings with the Magrane Houston Company,—the cost of materials, for instance?

A. Well, the cost of materials—there was a rising market on materials last year, a very considerable rising market, and we didn't get an opportunity to adjust our prices to the new conditions until the year was fairly well along.

X Q. 439. You wouldn't have an opportunity to adjust your prices to the Magrane Houston Company agency until 1919, on your theory, would you?

A. Yes, we would, because we get a percentage of the retail sales, so that if we made the retail prices, as we have done, higher than they had been, we would get a larger amount on each pattern sold.

X Q. 440. So that you had agreed——

A. They had agreed to that. They were to pay us 50 per cent of the retail price, and we raised the price from fourteen cents up to twenty cents.

X Q. 441. And I suppose you ascribed the cause to the war largely?

A. Well, the war seems to have been the thing that has been used to give color to all the increases in prices.

86 X Q. 442. Now, did you squeeze in a little profit there for yourself while you were marking it up?

A. For myself personally?

X Q. 443. No; the company.

A. No. I say we lost money last year.

X Q. 444. So that the additional price that you put on it didn't give you any greater profit than you had been getting before?

A. Why, it did so far as it operated last year, but I tried to explain to you that we didn't increase the prices until along in the fall of last year.

X Q. 445. You only took care of yourselves for the extra expenses that you were put to; isn't that true?

A. No; we meant to do a little more than that.

X Q. 446. That is, in the war expense there is little for the company?

A. We tried to fix it so that if we would take care of any known increase, and we would take the actual increase as a minimum.

X Q. 447. Now, this contract with the Magrane Houston Com-

pany, figuring it roughly, was more than two-thirds profits,—more than two-thirds; is that your story?

A. Let us see. Our income was six thousand; our total sales were——

X Q. 448. May I ask you this——

A. Yes, sir.

X Q. 449. Or you may finish your answer first.

A. Mr. Sullivan, we appear to have supplied altogether to them, or to have received from them $9,746.03; and I think I have figured our profits at $3,481; is that correct?

X Q. 450. Yes, if that is right; is it?

A. Yes, I think that that is quite right. Eliminating the exchange there was about $8,000, and it was probably about $3,400 roughly.

X Q. 451. Well, I was interested, Mr. Scanlon, in regard to the item of $3,200 as your net return for patterns alone. Isn't there such an item?

A. $3,200?

X. Q. 452. No, that is not it.

A. $2,612 was the profit on the pattern sales.

X. Q. 453. Profit?

A. Yes. And those patterns cost us—that figures, Mr. Sullivan, 47,509 individual patterns, and I figured their cost to be at two cents apiece, $950.

87 X Q. 454. I took you down this morning as saying on that $6,443 at retail, the estimated profits. Now, later you said one-half is our share, $3,221.50?

A. Yes.

X Q. 455. And then you said these will cost us $600.

A. Thirty-two thousand patterns——

Mr. Sheehan: You are asking Mr. Scanlon——

The Witness: I have got that, Mr. Sheehan.

Mr. Sheehan: You asked him what they had supplied.

The Witness: I have got it now.

X Q. 456. Your estimation for the court was that they would pay you theoretically $3,221.50?

A. Yes, sir.

X Q. 457. And that the patterns cost you $600?

A. That $3,221.50 represents——

X Q. 458. No. Is that right?

A. That figure is $644.28 to be exact.

X Q. 459. So that when I said that it represented two-thirds of the profits I was correct, wasn't I? $2,587.22 you want the court, as I understand it, to find would be the profit to you out of $3,221.50?

A. Exactly.

X Q. 460. And still you made no money last year?

A. We made no money last year; no.

X Q. 461. Now, can't you think, from your acquaintance with the trade, of any rule or opinion in the trade as to what the average profit is in percentage on sales of goods——

Mr. Dodge: Just a moment. Is it necessary to go into that any

further? It is obvious, and the witness has stated over and over again, that he did not take into consideration the element of office expenses or overhead expenses, which he says were not increased, or decreased, or affected at all, by the performance or non-performance of this contract. If his method of figuring the profit is wrong, that is so much the worse for our evidence; but he obviously is not getting anywhere by asking what the percentage of profit to sales in other businesses is, where of course, we are dealing with the business as a whole, are including overhead and all items of expense. We have not done that here. He says that 5½ cents out of 7½ cents is what they make on the individual pattern contract, not
88 including the overhead, on that of the patterns which are sold to the customers and do not come back by way of exchange. On the patterns that come back by way of exchange there is, of course, a loss.

Mr. Sullivan: But suppose that his Honor should not feel that that was the proper way to adopt in estimating the profits. If I can show some other way, which the court may adopt, haven't I a right to do so?

Mr. Dodge: Yes.

The Court: But you are inquiring now, Mr. Sullivan, are you not, as to the usage or practice of other——

Mr. Sullivan: Merely on cross-examination to test the witness.

The Court: The question of what other concerns may do, how will that assist us here?

Mr. Sullivan: I don't know, but having established that they were identical in kind and management——

The Court: There are so many elements entering into it that I do not think that it would help me,—business management, etc. The conditions would be so different, it seems to me, that it would be entirely inadmissible.

Mr. Dodge: Our percentage, the witness says, was something less than zero last year.

Mr. Sullivan: Perhaps it will be a benefit to you if we don't trade with you for a couple of years, if you are going behind that way.

X Q. 462. Do you wish to leave it, Mr. Scanlon, with the court that you have no way, from your experience, or your usage in your own business, of assisting us with reference to what the percentage of profit is figured to be, or attempted to be figured to be?

A. I have no way, Mr. Sullivan; no.

X Q. 463. You concede such an ignorance as is somewhat unusual for one of your experience?

A. I shouldn't say it was ignorance, to begin with.

X Q. 464. What?

A. I shouldn't say it was ignorance, to begin with.

X Q. 465. I am not critical; I merely use the word as a statement of fact. You are ignorant of it, aren't you?

A. Of what?

89 X Q. 466. Ignorant of what the percentage of profit is figured to be.

A. I don't know that it has ever been figured by anybody.

X Q. 467. Then, in your own business, there has never been any figuring by any of your people, the ones who estimate, for instance, what it costs to cut paper, and all that sort of thing, until they get it down to two cents a pattern—it is true, isn't it, that there is such an expert with you?

A. Yes.

X Q. 468. Nobody has ever gone on and figured what the ratio should be for overhead and all that?

A. No. On the contrary, if I may say so, our accountants——

X Q. 469. You have answered me, nobody?

A. Yes.

X Q. 470. And all these profits which you have detailed to his Honor before the adjournment are simply arrived at by hitting on the plan of multiplying 5½ cents by the number of patterns that you think they might sell, if they are lucky?

A. If you put it that way.

X Q. 471. And have you, in making up your mind what the probabilities of sale are, taken into account anything else than their past history with you?

A. No. That was the basis.

X Q. 472. That was the only basis, was it?

A. Yes, sir.

X Q. 473. Have you, for instance, gone over their history to see whether they were increasing or decreasing?

A. I haven't particularly done that; no.

X Q. 474. Did you know that they were decreasing monthly?

A. No, I didn't know that.

X Q. 475. What?

A. I didn't know that, but it wouldn't surprise me now if it had been the case recently.

X Q. 476. If that were true, that would rather affect the probabilities of their keeping up, wouldn't it?

A. No, it would not. They might change their methods, and would then increase their business.

X Q. 477. A lot of things might happen by which they would double their business.

A. I was figuring on the probabilities.

X Q. 478. And a lot of things might happen as the result of which they would not do half as much?

A. That is so.

X Q. 479. And it is all speculative, isn't it?

A. Yes.

90 X Q. 480. And one of the reasons why you want an injunction is because it is so speculative that you can't ascertain it? Who swore to the bill? You knew that the thing was speculative, didn't you?

A. Of course; yes.

X Q. 481. And have you taken into account, for instance, the probability that the R. H. White Company will get some of this business?

A. I have allowed for that.

X Q. 482. What allowance have you made for that?

A. That they would get none.

X Q. 483. The name "Standard Patterns" I understood from what you said to counsel is a valuable name?

A. It is; yes, sir.

X Q. 484. And if it is valued it must be because people have come to know of the good qualities of the product; is that not it?

A. Quite so.

X Q. 485. And if they know that, I assume that you meant that they would go wherever the Standard was?

A. To a certain extent, that is true.

X Q. 486. That is the ordinary good-will definition,—the probability that they will resort to the place where the Standard is. And if it has such pulling power, don't you think that some people might walk across the street to get it?

A. If I may elaborate my conclusion——

X Q. 487. No; I don't like your elaboration. Pardon me.

A. I can quite understand that; yes.

X Q. 488. You say yes, do you?

A. I don't know. Repeat your question, please.

X Q. 489. I say, if all those premises are true with reference to its value as a drawing card, isn't it probable that many of the former customers of the Magrane Houston people will walk across the street and buy your patterns?

A. I shouldn't say it is highly probable; no.

X Q. 490. Why not?

A. Because they would have an opportunity to buy another pattern in the Magrane Houston store, which presumably would be urged upon them as being as good a pattern as ours, if not a better pattern.

X Q. 491. Successfully urged?

A. Quite so.

91 X Q. 492. You are giving the drawing power of your own pattern all the worst of it in adopting that premise, aren't you?

A. No, I think not.

X Q. 493. Was there any other store near there that had the Standard patterns at that time, at the time that you told us——

A. At the time that we made our arrangement with the Magrane Houston Company?

X Q. 494. Yes.

A. Yes; Houghton & Dutton.

X Q. 495. So that for a couple of years, or nearly that, the Magrane Houston store was the only place in that district where you could get Standard patterns?

A. Yes.

X Q. 496. Then the R. H. White Company got going about a month before the Magrane Houston Company gave up?

A. Yes.

X Q. 497. And you would concede that the R. H. White Company store is just as attractive a store as Magrane's to the public, wouldn't you?

A. Yes, I think it is.

X Q. 498. A store, as his Honor doubtless knows, of long standing and high reputation in the community?

A. I think so.

X Q. 499. And of course it does more business than Magrane's, attracts more people to all its departments?

A. That I can't say.

X Q. 500. Are they right across the street from Magrane's or a little ways down the street?

A. I should say diagonally across.

X Q. 501. Of course you took all proper and reasonable steps to inform the public where they could get your product?

A. We took our customary steps.

X Q. 502. What are those?

A. An announcement on the fashion sheets.

X Q. 503. On the fashion sheets?

A. Yes.

X Q. 504. Well, didn't you advertise at all?

A. No.

X Q. 505. Did you take any steps to inform the public that formerly bought at Magrane's that they could go across the street and get the patterns at White's?

A. No. I think that the R. H. White Company made some such announcement in their advertisements. We took no such steps.

X Q. 506. That is, they carried it in their ad.?

A. I believe they did.

92 X Q. 507. Now, what relation does the amount of sales that you have been making in that district bear at the present time to what it was when you had the Magrane store?

A. The sales in the White store now?

X Q. 508. Yes.

A. As against the Magrane?

X Q. 509. Yes.

A. I should say that White is doing substantially more than Magrane did.

X Q. 510. So that you are now actually selling more of your product in that district than you were before Magrane abandoned his contract?

A. Than we did before Magrane abandoned it; yes; while Magrane had it exclusively there.

X Q. 511. Yes. In spite of the fact that the industry has been laboring under rather adverse conditions, hasn't it?

A. You mean in the matter of increasing costs?

X Q. 512. Yes.

A. Yes, that is so.

X Q. 513. And I suppose that the public that use patterns are affected in their purchases by increased cost, aren't they?

A. Affected?

X Q. 514. The number of patterns falls off, naturally?

A. I think that is true, temporarily.

X Q. 515. But, in spite of that, you are selling more patterns,—in spite of all these adverse conditions, which you know of, and I

don't, you are still selling more patterns in that immediate district than you did when Magrane was the sole agent?

A. White is selling more than Magrane; yes.

X Q. 516. Have you sized up White's sales to try to get trace of what percentage of them is due to sales to Magrane's former customers?

A. No.

X Q. 517. Is it possible to do that?

A. I don't know of any way in which I could reach a satisfactory conclusion on that.

X Q. 518. So that, as a matter of fact, anybody trying to estimate damages honestly for the loss of the sales of your product in the Magrane store would be apt to be very much disturbed, wouldn't he, about how much of it was going over to White's, so that you were still getting the benefit of it?

A. Not in my position; he would not have to be disturbed.

93 X Q. 519. No, of course; in your position you want to ignore White's, don't you?

A. No; I should give full value to Magrane Houston and not ignore White,—not ignore any consideration.

X Q. 520. Have you given thought to White's?

A. I have; surely.

X Q. 521. And have been unable to place it,—you have been unable to attach any figure to the possible business that went from this defendant's store to White's?

A. I haven't made the attempt. I am not unable to. I haven't made the attempt.

X Q. 522. And you have omitted to make the attempt because you were conscious that it was impossible?

A. No.

X Q. 523. Is that the reason?

A. Not altogether; no.

X Q. 524. Of course you wouldn't expect to get Magrane's customers into White's and get the benefit of their purchases, and still get from Magrane damages for the loss of the same customers, would you?

A. I don't understand that.

X Q. 525. You don't expect the court to give you compensation for the loss of the sale of your patterns through Magrane if the same customers go over to White and buy them, do you?

A. I wouldn't expect it under those conditions; no.

X Q. 526. And, not expecting it, haven't you attempted to get at the facts with regard to that? Have you been to White's?

A. No, because I am satisfied that that is not a statement of the actual condition.

X Q. 527. Your satisfaction is arrived at how?

A. By knowing that when the R. H. White Company was selling $15,000 of our goods a year, some years ago, they were selling in Houghton & Dutton's store at the same time seven or eight thousand dollars' worth, and I should expect the Magrane Houston Company

to maintain their business in spite of White's having an agency and, in fact, I should expect them to increase it.

X Q. 528. Did the R. H. White Company have the Standard patterns years ago?

A. Yes, twelve or thirteen years ago.

X Q. 529. Did the R. H. White Company have the agency then?

A. We had a department in White's.

X Q. 530. So that White was not selling it as an incident,
94 as he is now, but your organization was pushing it; that is the fact, isn't it?

A. Our sales girls.

X Q. 531. Now, I would like to be sure as to your attitude in regard to the desirability of having a limited number of agencies. I understood you, as a generalization, to say that it was desirable not to have too many agencies; is that true?

A. Not exactly. My statement was that the number has a very fixed and definite relation to the possibilities of the pattern business in that section.

X Q. 532. And you think that two were about right?

A. In Boston?

X Q. 533. Yes, in that part.

A. I would rather have three, but I would be fairly satisfied with two. I would rather have three in the down-town section of Boston, but I would be fairly satisfied with two.

X Q. 534. You realized, of course, in signing this contract, that the Magrane people bound themselves not to take anyone else's patterns?

A. That is right.

X Q. 535. That was an important thing in your mind, I suppose?

A. By anyone else you mean another pattern?

X Q. 536. Yes.

A. Yes.

X Q. 537. And if you could succeed in doing that at each store there wouldn't be any question about your monopoly, would there?

A. If we could succeed?

X Q. 538. Yes.

A. We never made the attempt, so that there couldn't be any question about it.

X Q. 539. You concede that the inevitable result of going around and getting the stores to sign this sort of a contract would be to eliminate everybody else?

A. If you could make that sort of a contract with every store, that would eliminate everybody else: yes.

X Q. 540. So that it does tend, you concede, to giving a monopoly?

A. I don't concede that at all.

X Q. 541. It gave you a monopoly on that corner and on White's corner, didn't it?

A. As a matter of fact, it has not, because in spite of the contract the Magrane Houston Company undertook to carry another pattern.

X Q. 542. Well, I am talking about what they could right-
95 fully do as you claim. So far as they could rightfully do it, as you claim, you had a monopoly of the Standard patterns?

A. Yes, in those two stores.

X Q. 543. Now, apparently White's man and you had some talk about the desirability to the merchant of not having more agents compete?

A. Yes, that is right; we had.

X Q. 544. And you, at the time you had that talk, knew that the Magrane people were going to get through?

A. No; I did not. I figured on their being our agents for another two years at least.

X Q. 545. Was that agreement with the R. H. White Company, binding you not to allow anyone to compete, made before June, do you think?

A. Oh, yes; it was made in February. I gave you the date this morning.

X Q. 546. But, as I understood before lunch, you didn't know, and you did not communicate to White's people, the fact that Magrane acted as though he was going to get through?

A. No; on the contrary, I knew nothing about Magrane.

X Q. 547. So that, as I understand your position, you were not guaranteeing White an exclusive agency?

A. Oh, no.

X Q. 548. But it was exclusive as to everybody except Magrane, I understood you to say?

A. Yes.

Mr. Dodge: Within a quarter of a mile.

The Witness: Yes.

X Q. 549. Well, that would exclude Jordan's and Bacon's and Stearns' stores, and exclude everybody that competed in the trade, you say?

A. Except Magrane and Houston. That is quite true.

X Q. 550. Was that at the same price, or was there a different price paid for that?

A. No; that was the same contract.

X Q. 551. You never had any talk with Magrane at all, as I recall it now?

A. I have in past years, but not about this matter.

X Q. 552. Can you give me the figures, did you have them taken off, of White's sales?

A. I haven't got them. I saw them. I had them over in New York.

X Q. 553. You had them made there?

A. Some time ago I wrote Mr. Marsh to see if he could get
96 the sales, and I think he got them and sent them over to me.

X Q. 554. So that I suppose you had in mind that you would like to know whether their size indicated that any of Magrane's customers were going to them?

A. No; it had no relation to the Magrane Houston situation at all. To tell you honestly, I wanted to see how they compared with the sales of the Pictorial pattern, which was on sale there before.

X Q. 555. You wouldn't think that it was an unusual thing if

customers now should come into Magrane's and ask for Standard patterns, would you?

A. I shouldn't think that that would be unusual.

X Q. 556. You would rather think, from the wide reputation of your house, or your product, that they would do that?

A. They might do it very readily.

X Q. 557. That is one of the things that you complain of, isn't it, that they do that, and that they are diverted?

A. I rather imagine that they are diverted; yes.

X Q. 558. If you found, for instance, that they were sent over to White's, would that affect your opinion as to the amount of damages that you ought to get?

A. I might be interested in that statement if I could be assured that that was made known upon their inquiry for a Standard pattern.

X Q. 559. So that in estimating your damages for the next two years you have estimated not merely your hopes but your fears, haven't you?

A. I don't quite follow that.

X Q. 560. You have charged up damages on the theory that the Magrane Houston Company would seek to divert any customer that came in for the Standard patterns to the McCall, haven't you?

A. I rather imagined that they would do that.

X Q. 561. And you have computed your profits on that basis?

A. Candidly, I don't see any connection between that and the conclusion that you are reaching. I have no reason to anticipate that they wouldn't do as much business, and I have reason to believe that they would do more even, with the White agency going, and my calculation is made entirely on that basis.

97 X Q. 562. I think that you were permitted to say this morning that it was understood in the trade that all the contracts had this provision, the contracts of your rivals, about doing business in only one kind of a pattern at a time in a store?

A. Yes that is the custom of the trade, the general custom.

X Q. 563. Is that in the McCall contract?

A. That is in the McCall contract.

X Q. 564. You are sure of that?

A. Quite sure, unless they use some special form occasionally that I don't see; but their usual form has that.

X Q. 565. And I understood you to go at some length into the danger of injury to business on all sides,—to the public, to the manufacturer and to the agent,—from having more than one?

A. Yes.

X Q. 566. Well, isn't that like some of the conventions in other walks, when we attempt to change them? I understand that you have got no basis at all in actual experience for knowing what the effect would be, have you?

A. Why, the thing seems to me to be——

X Q. 567. Seems to you, but I understood you to say that never in twenty-eight years had you known of two kinds of patterns being sold by the same agency?

A. No, I didn't say that. I distinctly said that I had known of it in several cases.

X Q. 568. Where, for instance?

A. Marshall Field of Chicago, I think, is handling two kinds.

X Q. 569. Now?

A. Yes.

X Q. 570. We need not argue about their standing as a merchant house, I suppose?

A. No. And I admit that any merchant who could get the patterns on the same terms would be wise to handle them.

X Q. 571. That is, you would admit that any merchant like Magrane, if he can get two makes of patterns, would be wise to get them?

A. If he can get them on the terms that Marshall Field gets them, I think so; yes; I think there would be money in it.

X Q. 572. So that, conceivably, there are cases in existence where it would be profitable for the merchant to have two?

A. Yes.

X Q. 573. So that you didn't mean to say this morning that
98 it was fundamentally a wrong way to do business?

A. I did mean to say that it was fundamentally a wrong way to do business.

X Q. 574. For the manufacturer?

A. And for the merchant.

X Q. 575. Unless he got them on good terms?

A. Unless he got them on good terms.

X Q. 576. Who else does that?

A. Bamberg's store, in Newark.

X Q. 577. A big store?

A. Yes. And maybe half a dozen that I have heard of at one time and another throughout the country.

X Q. 578. It is solely a question, isn't it, of its not being desirable for the manufacturer?

A. It is not desirable for the manufacturer.

X Q. 579. And the manufacturer controls the whole situation, fixes the selling price and fixes the thing generally?

A. Control?

X Q. 580. Yes; they have the control, haven't they?

A. No. They determine the basis on which they find it most advantageous to do business.

X Q. 581. And there is rather a striking uniformity among the manufacturers as to that, isn't there,—the contracts bear a close resemblance to each other?

A. In some particulars. In some particulars it is the reverse.

X Q. 582. In what particulars are they alike?

A. In the retail prices of the patterns and the discount to the agency.

X Q. 583. Yes. That is uniform, is it?

A. Yes.

X Q. 584. In all the contracts?

A. Yes, sir.

X Q. 585. And you wouldn't give a Standard agency on any other basis, would you?

A. No.

X Q. 586. And in all your six thousand agencies you use this stock form of contract?

A. Yes.

X Q. 587. And the McCall Company has a common form of contract embodying those two terms, doesn't it?

A. They have quite a few terms.

X Q. 588. So that they give quite a few concessions?

A. Quite a few concessions.

X Q. 589. They let other patterns be carried in their stores?

A. Only occasionally.

X Q. 590. They agree not to compete with the man that
99 they are fixing the price for, and tie up a man the way the Magrane Company was tied up here?

A. You have got an illustration here in Boston of the fact that they won't.

X Q. 591. I am asking you generally?

A. No, they don't.

X Q. 592. Then they do conform pretty closely to the regular contract form?

A. Oh, yes, their usual contract is very much like ours, except in one important particular.

X Q. 593. The result of this contract making is that you tie the merchant up, but he doesn't tie you up to guarantee him the benefits of the sale of your patterns, does he? Is that your uniform practice?

A. Our uniform practice is to give to the merchant——

X Q. 594. Is that it,—that you bind him not to take on any other pattern, and you reserve the right, tacitly or otherwise, to sell to his rival right across the street?

A. We usually reserve that right; yes.

X Q. 595. Usually do?

A. Yes, quite usually; yes.

X Q. 596. So that, although he couldn't enjoin you, you feel, from giving the patterns to the man across the street, you could prevent the manufacturer across the street from supplying him with patterns?

A. How is that?

X Q. 597. You won't let anybody else into his store with patterns, will you?

A. No; he agreed to that.

X Q. 598. And anybody may sell your patterns all round him, as far as he is concerned?

A. We reserve that right, but that is not the practice by any means.

X Q. 599. Then this was a variation of your practice, was it, to give them to White?

A. Oh, no, no.

X Q. 600. A regular thing?

A. A regular thing as far as it goes, yes, and to the extent that it went here.

X Q. 601. Now, you said to his Honor this morning that there was no opportunity to get any other firm to take this on, as I understood you?

A. Yes, sir.

X Q. 602. And that is based on your personal knowledge of their contracts, isn't it?

A. Largely by personal knowledge, direct, and for the rest of it, from the reports of our representatives whom I had investigate it.

100 X Q. 603. Well, it would be very unusual to be able to take anyone on at any particular time, anyway,—they are all signed up, aren't they?

A. They are all signed up; yes.

X Q. 604. But the contracts are expiring and being renewed all the time?

A. Yes.

X Q. 605. Does Jordan, for instance, have patterns?

A. Yes.

X Q. 606. What has he got?

A. The Pictorial.

X Q. 607. Do you know when his contract expires?

A. It has, to the best of my information, about three years to run; something over two years.

X Q. 608. What?

A. Something over two years, is my information on that.

X Q. 609. From now?

A. Yes.

X Q. 610. And you have, then, either personally or through your agents, been to all of these concerns in that vicinity?

A. I think we have been to every one of them.

X Q. 611. In that vicinity?

A. Yes, in the down-town section.

X Q. 612. So that you have limited your efforts to that vicinity entirely, haven't you?

A. Yes.

X Q. 613. You haven't been to stores anywhere up near Houghton & Dutton's, or anywhere like that?

A. No.

X Q. 614. No, because they are not competitive stores; they wouldn't take care of the trade that you would get at White's, would they?

A. Well, when you get that far away, you may have many reasons enter into it. I couldn't answer for that.

X Q. 615. Now, you call it an agency?

A. Yes.

X Q. 616. Do they buy the patterns?

A. In a sense they buy them. It is not an outright sale.

X Q. 617. Is there any restriction in their ownership of them that you know of.

A. Oh, yes, great restriction.

X Q 618. What are they?

A. They are obliged, as a contract matter, to return a pattern to us if they don't sell it.

X Q 619. Is that an obligation or a boon that you confer on them?

A. From the agent's standpoint it is a boon, I should say. In our case, I should say that is is an obligation.

X Q. 620. Well, you put a stop order on them, of course,
101 as to when they may return it; they have to do it, for instance, within two weeks, don't they, after the time expires?

A. We limit their exchanging privileges to January and February, and to July and August, each year.

X Q. 621. And if they will comply with certain conditions, then you will buy the patterns back; that is about it?

A. Yes.

X Q. 622. Is the risk on them all the time, do you understand?

A. Why, I should say that the greatest risk is on us.

X Q. 623. No; but in the case of fire, for instance, do they own them in that sense?

A. If they lose them they have to replace them; yes.

X Q. 624. And if you take them back you charge them something for the privilege?

A. Ten per cent.

X Q. 625: And at the termination of the contract, when you take them back you charge them 25 per cent?

A. Twenty-five per cent.

X Q. 626. So that it is really a mere matter of what you call it, whether it is an agency or a sale, isn't it?

A. Well, I should call that an agency, very clearly.

X Q. 627. Well, did you have those words put in there because you thought that it might affect the legal situation a little?

A. Those words have been in the contract for years; not with any special reference to any special law.

X Q. 628. But, as I get you, you sell the product to them. If it is burned or lost or destroyed, it is their loss——

A. Yes.

X Q. 629. —provided they make application within certain periods, you will buy them back at nine-tenths of what they pay?

A. Twice a year; yes. I think your understanding is correct on that.

X Q. 630. And you don't pay the help anything there?

A. No.

X Q. 631. They run it themselves?

A. You are speaking of——

X Q. 632. The defendant here runs it himself?

A. Yes.

X Q. 633. And all that he gets is your product?

A. That is the idea, and the service.

X Q. 634. Well, have you noticed any falling off in the subscriptions to your magazine?

A. No, no great change in the subscriptions to our magazines; no.

102 X Q. 635. You are getting about as many from White as you got from us?

A. I haven't checked that up particularly, as a matter of fact.

X Q. 636. Well, you wouldn't argue, would you,—of course you don't argue, but you wouldn't say, would you, that because White took the agency, if he and Magrane had kept on there would be twice as many subscriptions to a book like the Designer?

A. Twice as many? I would say there would be three times as many.

X Q. 637. Well, some of them that Magrane took are now being filled by White, aren't they?

A. Why, I am not sure about that, Mr. Sullivan.

X Q. 638. Now, I noticed that your incorporation was rather a modest one, if I looked at it right. $25,000, wasn't it?

A. Capital stock?

X Q. 639. Yes.

A. $75,000.

Mr. Dodge: It has been increased since then. I put in the original.

X Q. 640. Does your present concern represent any consolidations?

A. The Standard Fashion Company?

X Q. 641. Yes. Have you taken over any other concern?

A. No.

X Q. 642. The control of any other concern in the pattern business?

A. No.

X Q. 643. The Butterick, do you control that, under any lease, working arrangement, or anything?

A. Nothing at all.

X Q. 644. You are two distinct concerns, in other words?

A. Absolutely, from the ground up.

X Q. 645. Well, is it a fact that the biggest dividend that you ever paid was four per cent on the preferred and one per cent on the common on this capitalization?

A. I am not aware that we have any preferred stock. I am not aware that we have anything that corresponds with your question?

X Q. 646. Well, what has been your dividend? Have you ever paid one?

A. Oh, yes.

X Q. 647. How much?

103 A. Oh, I have seen dividends declared as high as, I think, $100,000 in a year, or $110,000, and sometimes as low as forty, and last year none at all.

Mr. Sullivan: I don't think of anything else to ask.
The Court: Anything in the redirect?
Mr. Dodge: A very few questions, your Honor.
Mr. Noble: Will your Honor indulge us for just a second?
The Court: Certainly.
[Counsel for the plaintiff hold a short conference.]

Redirect examination.

By Mr. Dodge:

Q. 648. There is one point upon which I do not wish any misunderstanding to be left, and that is with reference to the Buttterick Publishing Company and the Standard Fashion Company—the Butterick Publishing Company, which makes the pattern. There is some relation between the stockholders of the two companies, is there not?

A. There is a common ownership of the Butterick capital stock—of the Butterick Publishing Company capital stock.

Mr. Sullivan: What misunderstanding was there?
Mr. Dodge: I thought that perhaps the testimony left the impression with his Honor that there was no relation between the stockholders of the two companies.
Mr. Sullivan: Of course it did. I asked him if there was any control, through a holding company, or lease, or anything else.
Mr. Dodge: No, you did not ask him anything about a holding company.
Mr. Sullivan: Yes; those were the exact words that were used.
Mr. Dodge: I did not understand you to ask him anything about a holding company.
Mr. Noble: I didn't, either.
The Court: Let us have the question and answer read, and see what it was.
[The reporter reads as follows:]

"X Q. 640. Does your present concern represent any consolidations?

A. The Standard Fashion Company?

X Q. 641. Yes. Have you taken over any other concern?

A. No.

104 X Q. 642. The control of any other concern in the pattern business?

A. No.

X Q. 643. The Butterick, do you control that under any lease, working arrangement, or anything?

A. Nothing at all.

X Q. 644. You are two distinct concerns, in other words?

A. Absolutely, from the ground up."

Q. 649. You stated that there was a holding company. Are the executive officers of the two companies distinct?

A. Yes.

Q. 650. The business is performed entirely distinctly?

A. Entirely distinctly; yes, sir.

Q. 651. And they have no agreements among themselves?

A. Absolutely none that I know of.

Q. 652. That is, the only connection is the fact that there is a holding company that owns the stock?

A. That is all it is,—a majority of the capital stock of each of the two companies is owned by a holding company.

Q. 653. You were asked a question with reference to this point,—whether or not the R. H. White negotiations, or the R. H. White contract, was made with a view to the approaching termination of the contract with this defendant. What is the fact with reference to that?

A. When I made the contract with the R. H. White Company I had every reason to believe that the Magrane Houston agency would continue for another two years.

Q. 654. You say that you made the contract with the R. H. White Company the first of February?

A. The 7th of February.

Q. 655. How long before that time had you been negotiating with the R. H. White Company for the taking on of your agency after they got through with the other patterns?

A. Oh, upwards of a year and a half, or two years.

Q. 656. White had handled your goods before?

A. Yes; he had handled them prior to 1913.

Q. 657. You have already stated that there is in your contract with White a provision that you should be allowed to continue to supply the Magrane agency?

A. Yes, sir.

Q. 658. One question I forgot to ask you before: You spoke
105 of the increase in price of your patterns. I will ask you whether or not other patterns have been increased in price recently?

A. Patterns of other makes?

Q. 659. Yes.

A. Yes, all the patterns have been increased in price.

Q. 660. That figure of 5½ cents profit over the manufacturing cost of patterns which you referred to relates only to patterns that are sold to the public through the agent?

A. Yes, patterns in regard to which we accomplish a full and complete sale to the public.

Q. 661. When a discarded pattern is returned, the allowance which you made of 90 per cent means that all that you have received for that pattern is 10 per cent of 7½ cents?

A. Yes.

Q. 662. Or three-quarters of a cent?

A. Ten per cent of whatever the particular price of the pattern may be.

Q. 663. So that of course there is a loss on that?

A. Yes.

Q. 664. With reference to the classes of expenses which you did not deduct in determining your estimated profit upon goods that would have been sold by this defendant, is it a fact that the general expenses of your business in any respect would have been affected by the continuance of this contract?

A. No; I can't see that the expenses would be affected in any way.

Q. 665. Would your expenses of designing and creating the ideas of the patterns have been changed any?

A. No; the same designing force right along.

Q. 666. I understood you to say that you would consider that the proper number of agents to have in a city like Boston and the retail district thereof would be three?

A. I should say I would like to have three; yes.

Q. 667. And whether or not you would expect to sell more patterns through three agencies than through two or one?

A. I would expect to sell more through three than through two or one; yes, sir.

Q. 668. That is, you had that in mind in fixing that figure at three?

A. Yes.

Q. 669. You spoke of five or six large stores in the country, and named two or three of them, I think, where you say that two patterns are handled, and you have said that it would be an ad-
106 vantage to any retailer, any storekeeper, if he could get those terms, to handle two patterns?

A. Yes; I said that I think it would be a money advantage to them. It decidedly would.

Q. 670. Is it the fact that the pattern companies who sell their patterns in Marshall Field's store pay for the privilege of doing it?

A. I so understand that they pay for the privilege of doing it.

Q. 671. That is because of the very exceptional reputation of that house?

A. For the use that they are allowed to make of the Marshall Field store I should suppose that the pattern manufacturers would expect to pay.

Q. 672. I think that you said that there was one particular in which the McCall form of contract differed from yours. What is that?

A. They do not redeem their pattern stocks that the merchant does not sell, and it has the effect of making a greater accumulation of pattern stock with the merchant.

Q. 673. So the merchant stands the loss on them?

A. The entire loss is on the merchant; yes.

Q. 674. By the way, I think that perhaps you placed White's store a little nearer the Magrane Houston store than it really is. It is on the further corner of the second street up Washington Street, isn't it; that is, instead of being diagonally opposite, it is up at the further corner of Bedford Street?

A. Bedford Street; yes; and Temple Place is Magrane's. There would be a block intervening.

Q. 675. That is, it is diagonally across from the corner of West Street and not of Temple Place?

A. Yes, sir.

Mr. Dodge: I think that that is all.

Recross-examination.

By Mr. Sullivan:

X Q. 676. These patterns that were returned, what did you do with the patterns that were returned?

A. They are held by us down there subject to your order.

X Q. 677. Are they any good?

A. Some of them are; yes.

X Q. 678. Are they good to you?

A. Some of them are.

X Q. 679. Worth the $788?

A. To us? Oh, no. If you want the exact figures, a thou-
107 sand dollars' worth would weigh about 100 pounds and would be worth maybe four or five dollars, I suppose, as waste paper.

X Q. 680. Styles are not synonymous everywhere, are they? Styles don't burst on the world in all cities at the same time, do they?

A. In the United States I rather think that they do. You can't sell out of date styles anywhere in the United States.

X Q. 681. Even in the small places?

A. Yes. It has been tried by one company and they have found that it is a failure.

X Q. 682. Not your company?

A. No.

X Q. 683. You say that the McCall people vary in their practice from the Standard in that they don't take return stocks?

A. Yes; it is not their practice.

X Q. 684. They exchange stocks right along, don't they?

A. Yes.

X Q. 685. So that a merchant can take care of himself as he sees the end of the contract approaching, can't he?

A. I doubt it very much.

X Q. 686. All that we had was a thousand dollars' worth, wasn't it?

A. You had a thousand dollars' worth originally.

X Q. 687. That is all we sent back?

A. You returned to us an amount corresponding to the original stock received.

X Q. 688. So that that was all that accumulated there?

A. There was substantially no accumulation in your case.

X Q. 689. Just one thing that you adverted to this morning,—that it would injure you throughout the country to have it pointed out that you had been ousted from our store by the McCall people; you remember that?

A. Yes, sir.

X Q. 690. Has there been any other ousting by the McCall people of your patterns from any store?

A. Nothing of such prominence as the Magrane Houston Company.

X Q. 691. Has there been anywhere by any other pattern company?

A. There have been oustings here and there occasionally.

X Q. 692. So that this is not anything novel?

A. An ousting in violation of contract is quite novel; yes.

X Q. 693. Well, has the changing—that is the important
108 thing, isn't it—the changing over is what might work injury to you, isn't it?

A. Just what do you mean by changing over?

X Q. 694. From yours to the McCall?

A. No, not the change, but the significance that the changing over would be made to have in the minds of merchants throughout the country.

X Q. 695. Oh, you mean that the agents or representatives of pattern manufacturers might tell other merchants that the Magrane Company had decided to throw your contract up in the way that they did, and got away with it, and therefore they could do it?

A. They might do even that.

X Q. 696. Is that what you fear?

A. That is part of what I fear.

X Q. 697. That is, you think that it would injure your business if it were known that a firm took a contract like this for two years, and from term to term thereafter, and complied with it strictly for two years and three months—and they did that, didn't they?

A. For more than two years and three months.

X Q. 698. You think that it would hurt you to have that known, provided it was also known that if they didn't give notice of termination it would go on indefinitely?

A. No; no great damage would attach to a change in a pattern, but a change under these conditions has damaging possibilities for us.

X Q. 699. That is, when you urge that as an element of damage on the court, what you mean is that you would like to be able to say to possible or present customers that, if they sign a contract which renews itself from term to term, it goes on forever unless notice is given within thirty days after the expiration of some one of these two-year periods?

A. Not in just that way. I wouldn't say forever, because we very often close business relations with a concern,—take the initiative in doing it.

X Q. 700. So far as the right of the merchant to get rid of it——

A. He has the right once in two years to do it.

X Q. 701. And if he lets the thirty days go by he is stuck for a further term of two years?

A. They do business with us for two years.

X Q. 702. And three months?

A. And three months.

X Q. 703. So that the best time in which he could escape from it would be two years and one day and three months?

A. Two years and three months is the minimum term of the business association that that contract contemplates; yes.

Mr. Sullivan: That is all.

Redirect examination.

(By Mr. Dodge:)

Q. 704. I want it to be perfectly clear as to the value to you of those goods which were returned to you, and which you are holding. Were there some of those patterns that were still up-to-date and have a market value?

A. Yes; there would be some that we could restore to stock, I think. I haven't examined them to ascertain that fact, but undoubtedly there would be quite a few of them in condition to put back into stock.

Q. 705. You have not ascertained what the value of them is?

A. We haven't checked the shipment up at all. I know that it is there.

Q. 706. You were asked about the McCall contract and other breaches of contract. Do you know whether it was the McCall contract that was responsible for the Fisher case in the State courts with the Butterick Company?

A. Yes, that was the McCall contract.

Mr. Dodge: That is all.

WALTER H. MARSH (sworn).

(By Mr. Dodge:)

Q. 1. Your name is Walter H. Marsh?

A. Yes, sir.

Q. 2. And where do you live?

A. I live in Hudson, New Hampshire.

Q. 3. And are you in business in Boston?

A. I am.

Q. 4. Employed by the Standard Fashion Company?

A. As manager of the Boston branch office.

Q. 5. Manager of the Boston branch office. And how long have you occupied that position?

A. Since 1914—1904.

Q. 6. 1904?

A. 1904.

Q. 7. Was that the beginning of your employment by the Standard Fashion Company?

A. That was the beginning.

Q. 8. Are you familiar with the retail dry goods district, as it has been called, in Boston?

A. Yes.

Q. 9. Are you familiar with the various stores that handle patterns?

A. I am.

Q. 10. I hand you a plan and ask you if you had that prepared, showing the streets and the stores devoted to dry goods [placing before the witness a blueprint plan]?

A. Yes.

Q. 11. Between Boylston Street and Beacon Street, or Boylston Street and School Street, and Tremont Street and Washington Street, or Arch Street?

A. Yes, sir.

Q. 12. That shows substantially all of the——

The Court: Tremont and Washington Streets and Boylston and School Streets?

Mr. Dodge: Yes, sir; that is substantially it. I see it does go a little to the east, as far as Chauncy Street, or Arch Street,—a little east of Washington Street.

Q. 13. And does that show substantially all the dry goods stores?

A. Yes, sir.

Q. 14. All the stores which handle patterns?

A. Yes, sir; I think they are all located.

Q. 15. I want to ask you one preliminary question. You see the Magrane and Houston store at the corner of Temple Place and Washington Street. I want to ask you what other stores that handle patterns are nearer that store than is the R. H. White Company?

A. There is the Jordan Marsh Company store directly across the street; and Shepard & Norwell in the same block, on Temple Place, Temple Place and Winter Street; and the Butterick Publishing Company has a salesroom of its own just in the next block. The May Manton people have a salesroom, or an agency, in Temple Place, two or three doors, I think, from the Magrane Houston Company.

Q. 16. How about the T. D. Whitney store?

A. They have no patterns.

Q. 17. Now, isn't the Gilchrist store on Washington Street somewhat nearer than R. H. White's?

The Court: Nearer to what?

111 Mr. Dodge: Nearer the Magrane and Houston store.

A. Why, I should think it was a little nearer.

Q. 18. A trifle nearer?

A. Yes, sir.

Q. 19. Are there any others that are nearer the defendant's store than White's?

A. Those that I have mentioned

Q. 20. Any others than those you have already mentioned?

A. I think not. I don't locate any here.

Q. 21. Are you familiar with the other pattern concerns besides the Standard?

A. To some extent; yes.

Q. 22. Do you know where their agencies are located in Boston?

A. Yes. The Pictorial have an agency with the Jordan Marsh Company.

Q. 23. Where is the McCall Company located, other than with the defendant?

A. They have an agency with the Gilchrist Company, and with the W. & A. Bacon Company, and Butler's store, on Tremont Street the corner of Bosworth Street.

Mr. Sheehan: In addition to the Magrane & Houston?

Mr. Dodge: Yes. I asked that.

Q. 24. And do those three stores that you have just named handle any other patterns than the McCall?

A. Butler's store handles also the May Manton patterns.

Q. 25. The May Manton patterns are distributed on a somewhat different basis from all the others, aren't they?

A. I understand so.

Q. 26. Is it the fact that they are sold on consignment?

A. They are consigned, and sold on consignment, usually.

Q. 27. A totally different sort of arrangement?

A. A different sort of arrangement.

Q. 28. Where are the Butterick patterns sold?

A. The Butterick patterns are sold by the Shepard, Norwell & Company, and they also have, as I said, a salesroom of their own, at 499 Washington Street, that is between Temple Place and West Street.

Q. 29. Proceed and tell us about some of the other companies.

A. The May Manton patterns are sold in the Chandler corset store on Temple Place as well as at the Butler store. The Elite is sold at 453 Washington Street. And the Paris patterns are sold
112 at 7 (I think) Temple Place. Vogue is sold on Tremont Street, near the corner of West, an upstairs location.

Q. 30. You have spoken of the Pictorial at Jordan & Marsh's. How about the Home pattern made by the Ladies' Home Journal?

A. Those are sold by the C. F. Hovey Company.

Q. 31. Now, are all those agencies that you have named within 750 feet of the Magrane Houston store?

A. Yes, measuring 750 feet, this plan.

Q. 32. Is there any pattern concern, pattern manufacturer, that you know of, that does not have an agency within 750 feet of the Magrane Houston concern?

A. The Peerless Company.

Q. 33. That is the only one?

A. That is the only one that I recall. That is the only one.

Mr. Dodge: I would like to put this plan in evidence, Mr. Sullivan.

Mr. Sullivan: All right, if it was made accurately.

Q. 34. This was made, was it not, Mr. Marsh, with special reference to this case?

A. Yes, sir.

Q. 35. You had it drawn by an engineer?

A. Yes, sir.

Q. 36. And, so far as you know, it is an accurate plan?

A. I had a plan that was similar to this, that was drawn sometime ago, covering the retail dry goods district, and when this case came up I had that old plan redrawn, that is, there had been some changes in the business properties since my first plan was made, but this is brought up to date.

Q. 37. And you had the dry goods stores put on it?

A. Yes, sir.

Mr. Dodge: I think that that is all. Oh, before having it marked, I want to ask Mr. Marsh where that store of Grosberg's was at which the Standard patterns were being sold when the contract with the defendant was made.

The Witness: That was located in the block south from the Magrane & Houston Company, on the opposite side of the street, in the next block.

Q. 38. Between Avon and Bedford Streets?

A. Yes, sir.

Q. 39. So that it was nearer the Magrane Houston Company store than is the R. H. White Company store?

A. It was.

Q. 40. And have you marked a cross with a pencil on the
113 place where that store was, on the east side of Washington Street?

A. About the location; yes, sir.

[The map referred to, entitled "Map of the Dry Goods District, Boston, Mass. Drawing by Edwin K. Blaikie, 67 Milk St., Boston. Scale 100 Ft. = 1 In. Job 419, July 18, 1917," is marked "815 Eq., Plff's Ex. 14, J. E. G., Jr., Dep. Clk., 11/27/17."]

Q. 41. Have you made investigation, Mr. Marsh, of the agencies of all the pattern companies in a wider extent of territory, that is, in Boston and some of the immediately adjacent cities?

A. Yes, I have personally visited agencies for patterns, pattern agencies, in Boston, Somerville, Cambridge, Chelsea and Brookline.

Q. 42. How many pattern agencies are there in those cities?

A. I personally have visited 119.

Q. 43. One hundred and nineteen.

A. Yes, sir.

Q. 44. How many of those are agencies of the Standard?

A. Eight.

Q. 45. And are those all the agencies which the Standard has in those cities?

A. I believe so.

Q. 46. How many agents has the McCall in that same territory?

The Court: Pardon me. I do not like to interfere, but how is it material to wander off into other cities with regard to the number of agencies?

Mr. Dodge: Simply not to confine our attention to this very small

retail dry goods section of Boston, but to take greater Boston, on the question of monopoly and restraint of competition, etc.; we felt that it might be important to show a larger area.

Mr. Sullivan: I don't know. I am not quite clear as to what is the state of affairs, if the act is important, whether the question is whether the specific contract tends to create a monopoly. If it does, I think it is obnoxious to the statute. Because they cannot succeed in doing it does not make their contract virtuous, I think.

Mr. Dodge: Does this comment relate to this specific evidence that I am offering, or is it general?

Mr. Sullivan: No; I am trying to make it specific. Because you have not succeeded in doing what you would like to do is no proof that this contract——

114 Mr. Dodge: I do not get the bearing of that on this offer of proof.

Mr. Sullivan: I thought that you were attempting to show that you haven't a monopoly, that there were a lot of other companies.

Mr. Dodge: I want to show the business in this locality, taking "locality" first in the restricted sense, but now in the broader sense, but still within the limits of this municipality.

The Court: The defendant, in its answer, sets up the statute, does it not, Mr. Sullivan?

Mr. Sullivan: Yes; I intended to, at least. I don't know whether I am happy in my phraseology or not, but that is what I meant

The Court: Then what is done in other cities, how is that material?

Mr. Dodge: Because this act, like the Sherman Act, has got to be construed in the light of reason, and it is a question whether there is now, or has been in the making of this contract, any tendency towards the establishment of an undue monopoly, or an undue restraint of trade. I thought that conditions in a somewhat wider area might be competent. If your Honor does not think so, I do not care to press it, but it does seem to me that it is competent to show that the tendency of this contract, and of contracts of this sort, is not to create a monopoly in any one kind of pattern in the City of Boston.

The Court: In the City of Boston, yes, but you wandered outside.

Mr. Dodge: I took those immediately adjacent municipalities which are practically a part of Boston, right across the river. Cambridge is only seven minutes from this store, I take it.

Mr. Sullivan: Greater Boston is a term that includes even the part of the country that I come from, if you talk with the Greater Bostonites.

Mr. Dodge: The places that we have taken are places right across the harbor or river, such as Chelsea and Somerville, right within seven minutes from the Park Street station, like Cambridge,—

115 adjoining Boston, and really part of it,—like Brookline, for example.

The Court: I thought that perhaps it would shorten it a little bit, but I guess it hasn't.

Q. 47. I simply asked how many agencies the McCall Company had?

A. The McCall Company has in that district twelve.

Q. 48. And give us the others?

A. The Standard, eight; the Butterick, twenty-three; the New Idea, eighteen; the Home, four; the Peerless, two; the McCall, twelve; the May Manton, twenty-four; the Pictorial, twenty-four; the Paris Pattern Company, one; Vogue pattern, one; Elite, one; Bon Ton, one.

Q. 49. And those last, which have only one, are confined to the Boston district?

A. Yes, sir.

Cross-examination.

(By Mr. Sullivan:)

X Q. 50. You don't mean that those are stores, all of them?

A. No.

X Q. 51. Not in the sense that our store is a store. You have been in a little Buck-Eye stores, wherever you could find them?

A. Yes.

X Q. 52. Where you could find a May Manton stock in the window—a little store that some old widow runs,—a one-person store?

A. Very likely.

X Q. 53. There are lots of those stores, aren't there?

A. Very likely.

X Q. 54. What?

A. Very likely.

X Q. 55. Yes. Well, "very likely" there are. There are, aren't there?

A. I don't know whether they are run by widows or not.

X Q. 56. I didn't mean that you inquired about that; but how many stores are there on your list that are comparable to ours, in a general way, I mean,—that is what we want to get at?

A. Why, there are not many outside of the Boston district, of course.

X Q. 57. Well, how many are there in Boston, roughly?

A. How many agencies?

X Q. 58. No, no.

A. There are a number of course.

116 X Q. 59. You are right here in Boston; you are not in New York.

A. I am in Boston; yes.

X Q. 60. You live here?

A. Yes, sir.

X Q. 61. And you know what we are talking about, then, pretty well,—this district here around Magrane's, Jordan's, White's, and those stores?

A. Yes.

X Q. 62. Surely a dozen would comprise all the stores that are in the same class, wouldn't it?

A. I should think it might.

X Q. 63. And perhaps I am strong in saying a dozen, am I not?
A. Taking all the dry goods stores?
X Q. 64. No, no; but the big fellows.
A. In the class of the Magrane and Houston?
X Q. 65. Yes; a dozen would cover it, wouldn't it?
A. I haven't counted them up.
X Q. 66. I haven't, but I am guessing. Isn't that true, probably?
A. I should think there would be as many as a dozen.
X Q. 67. How many does the Butterick Company have out of that dozen?

Mr. Noble: Out of the dozen? I didn't quite catch what that referred to.
The Court: Stores of the size of the Magrane and Houston store.

X Q. 68. The Butterick has how many, do you think?
A. Do you consider Timothy Smith of Roxbury in your class?
X Q. 69. Well, I'll play it safe, and say no, if he is out in Roxbury. I don't know what my client would think of me if I should agree that a Roxbury store was equal to the Magrane and Houston.

Mr. Dodge: It was limited to the Boston district, wasn't it?
Mr. Sullivan: I think that the question was too vague. I will change it, anyway.

X Q. 70. Who had Jordan's last summer, at the time——
A. The Pictorial.
X Q. 71. Filene had nobody?
A. No.
X Q. 72. And Stearns had nobody?
A. No.
X Q. 73. Shepard?
A. They have Butterick.
X Q. 74. Shepard's is a big concern, bigger than ours, of course, isn't it?
A. Perhaps so.
117 X Q. 75. You think so, don't you?
A. I think so.
X Q. 76. Well, I only want what you think. You work for the Butterick people, don't you?
A. I do.
X Q. 77. Do you?
A. Yes.
X Q. 78. So the Butterick and Standard are the same thing, aren't they?
A. No, sir.
X Q. 79. What?
A. No.
X Q. 80. Well, you work for the Butterick?
A. I work for the Butterick.
X Q. 81. And did you put this contract through for the Standard?
A. Why——
X Q. 82. Did you? Yes or no?

Mr. Dodge: "Put it through" is rather a general——

Mr. Sullivan: Oh, you understand that colloquialism, don't you? You are the one that put it on to the Magrane and Houston people, got them to sign this contract,—you got them to sign the contract, didn't you?

The Witness: That credit belongs to somebody else.

Mr. Dodge: Solicited the contract? I do not like your phrase "put it on to them." They probably wrote this to everybody.

X Q. 83. You are the one that went to Mr. Hanley, you represented the Standard in the negotiations which resulted in this happy union, if you want to put it that way?

A. Yes.

X Q. 84. For the Standard?

A. Yes, sir.

X Q. 85. Were you working for the Butterick then?

A. Yes, sir.

X Q. 86. So that the employees are interchangeable, are they?

A. To some extent; yes, sir.

X Q. 87. You get your money from the one and work for the other; is that it?

A. I represent the Standard.

X Q. 88. As well as the Butterick?

A. Yes, sir.

X Q. 89. How many agencies has the Butterick got?

A. They have got Shepard's and their own salesroom right in that district.

X Q. 90. This salesroom of the Butterick's is near Magrane's, is it?

A. Yes.

X Q. 91. Across the street?

A. Across the block on the same side.

118 X Q. 92. Upstairs or on the ground floor?

A. On the ground floor.

X Q. 93. And do you do business for them?

A. I do.

X Q. 94. So that this concern that operates these two companies has got three large concerns here by Magrane's?

A. I don't think I understand.

X Q. 95. The Butterick and the Standard had how many?

A. There were three agencies for the two.

X Q. 96. And they still have got three?

A. Two agencies and their own salesroom. The Standard has one agency and the Butterick the other.

X Q. 97. They still have that number?

A. They still have that number.

X Q. 98. Well, now, do you think that there is any trouble about getting another salesroom for the Standard?

A. Another salesroom?

X Q. 99. Yes.

A. I don't think we have tried to get another salesroom.

X Q. 100. Do you think that you would have had any trouble

last summer in selling the Standard goods under some arrangement in one of the big stores?

A. I never tried. I didn't try it at all.

X Q. 101. You didn't try it at all?

A. No.

X Q. 102. Well, did Mr. Scanlon come over here in the summer and see you?

A. This last summer?

X Q. 103. This last summer.

A. I don't recollect whether Mr. Scanlon was over last summer or not.

X Q. 104. Or Mr. Kelly? What effort was made, if you recollect, to find a place that you knew of?

A. I didn't look it up at all.

X Q. 105. Weren't you the fellow that did it?

A. No.

X Q. 106. Why?

A. Because it was not put up to me; it was not given to me to do it.

X Q. 107. Weren't you the Boston representative?

A. I was.

X Q. 108. And wouldn't you be the one, naturally, to do the soliciting?

A. Not necessarily.

X Q. 109. We don't like "necessarilies." Wouldn't you?

A. No.

119 X Q. 110. Who would be?

A. Anyone that Mr. Scanlon might designate.

X Q. 111. Whom would he designate?

A. A traveller from his office.

X Q. 112. Did the traveller come?

A. Mr. Scanlon himself came.

X Q. 113. When?

A. Last spring. You asked me about the summer, I think.

X Q. 114. So that he was over in the spring?

A. Yes, sir.

X Q. 115. But since Magrane gave up has he been over—in July?

A. No; not that I recall.

X Q. 116. Does Chandler's concern have patterns?

A. No.

X Q. 117. Stearns, Mr. Scanlon says, doesn't. Does it?

A. No.

X Q. 118. Have you tried them lately? Apparently it is some years since he tried them.

A. Chandler's dry goods store on Tremont Street?

X Q. 119. Or Stearns. Have you tried Stearns?

A. No, sir.

X Q. 120. Not for years?

A. Not since—I haven't talked patterns to them since they handled Standard patterns before.

X Q. 121. Before?

A. Yes, sir.
X Q. 122. Neither the Standard nor the Butterick?
A. No, sir.
X Q. 123. Did you visit the Magrane store during the time that they were carrying out their contract?
A. Oh, yes.
X Q. 124. Everything was carried out all right, wasn't it?
A. Oh, yes; I think so.
X Q. 125. No trouble for the two years and five months?
A. Why, nothing——
X Q. 126. Only the usual "kicks" about patterns,—eh?

Mr. Dodge: I don't think that the "kick" was on that side. I wish that you would let him answer that question. You interrupted him in his last answer.

Mr. Sullivan: Pardon me. I didn't mean to. I was a little zealous, that is all.

The Witness: I think there was a little trouble. I mean, I think that the Magrane people objected to paying for goods charged
120 on their purchasing account while they had exchange credit, credit on exchange account.

X Q. 127. You got along all right?
A. Oh, yes.
X Q. 128. They seemed to be willing to make money on your patterns, didn't they, seemed to be willing to sell them?
A. Yes.
X Q. 129. Did you notice the sales diminishing?
A. I didn't keep track of the sales.
X Q. 130. Well, just what do you do? You have the agency representing New York, don't you, for the two companies?
A. The Standard——
X Q. 131. No. Do you have the agency? Are you the——
A. No; I am the manager of the Boston branch office.
X Q. 132. Yes. Now, wouldn't you know if your business with them was diminishing? Wouldn't that be a matter of concern to you?
A. Well, I didn't know it, although it might have been true.
X Q. 133. You don't know whether it was or not?
A. I do not; no, sir.
X Q. 134. Well, the pattern business has become a little harder, a little less profitable, hasn't it, since the war?
A. I don't know anything about the profits in the pattern business.
X Q. 135. You don't?
A. No, sir.
X Q. 136. You haven't any idea of whether it is more or less profitable?
A. No, sir; positively not.
X Q. 137. You don't talk that at all while you are selling them?
A. Talk our profits when we are selling?

X Q. 138. Yes; how cheaply you are selling them, for instance, or how little profit you get?

A. If I attempted to talk profits, I should talk about something that I knew nothing about personally, excepting from hearsay.

X Q. 139. Has the business, to your knowledge, become obviously complicated or difficult from the manufacturer's standpoint since the war, within the last year, for instance?

A. I am not competent to answer that.

X Q. 140. Is it common knowledge among people in your position and in your trade that the business is harder and less
121 profitable for the manufacturer in the last year and that it is growing more so?

A. I don't know. The cost of materials, of course, is more.

X Q. 141. Let me help you——

A. And the cost of labor is more. I can understand all that, but about the profits of the business, I don't know anything about those.

X Q. 142. I see. Well, do you remember bringing over money to Magrane's, because the business was getting down, to pay for advertising?

A. No, sir.

X Q. 143. Did you ever bring any $100 check over there?

A. I can't recall that I ever did.

X Q. 144. Well, did you arrange for the delivery of a check of $100 to see if they couldn't speed up the business a little by advertising?

A. Possibly I may have.

X Q. 145. Do you remember the incident?

A. I do not; no.

X Q. 146. Or of talking about it either,—do you remember an argument about it?

A. There was something about our doing something in the way of advertising here, newspaper advertising.

X Q. 147. When? When was that?

A. Why, I should think it was a year ago this last spring.

X Q. 148. Wasn't it this last spring?

A. No, sir; I don't think so.

X Q. 149. Well, was it because the business was sagging a little?

A. Not that I know of.

X Q. 150. What?

A. No, sir.

X Q. 151. Just a routine talk, was it?

A. I think so. I think that the Magrane people thought we should do something in the way of advertising the business in the newspapers, and we contributed something. The idea has gone from me as to what it was at the time.

Mr. Sullivan: That is all.

Mr. Dodge: Just a question or two, and then we shall be through, your Honor.

Redirect examination.

(By Mr. Dodge:)

Q. 152. Mr. Marsh, I want to get your answer on the record to this question: Did you deliver this letter of July 14, Plaintiff's Exhibit 13?

A. I did. I delivered it to Mr. Hanley.

122 Q. 153. On July 17?

A. On July 17.

The Court: July 17, 1917.

Q. 154. One other question, I think, and that is all, as long as it has been opened up. What effects, if any, of the war have you yourself observed in the pattern business?

A. In regard to the sales?

Q. 155. Yes; general conditions in Boston.

A. Why, I don't know that I have made any special observation.

Q. 156. Does everything seem to be about the same?

A. I should say everything was about the same.

Mr. Dodge: That is all, Mr. Marsh.

The Court: The prayer in the bill is for a preliminary injunction. I want to ask counsel if this is to be a final hearing in the matter. You are proceeding as if this was the final hearing upon the bill; the bill and the answer.

Mr. Dodge: This is a final hearing, your Honor. We concluded not to ask for a preliminary injunction, but to ask for this hearing on the merits.

The Court: We will adjourn now.

[Adjourned to 10 a. m., Wednesday, November 28, 1917.]

Boston, Mass., November 28, 1917.

Mr. Noble: Mr. Dodge will be here in just a moment, if your Honor please. He is in the clerk's office.

The Court: Do counsel think that we may conclude the hearing today?

Mr. Sullivan: I hope so; yes, sir.

Mr. Dodge: Mr. Marsh, will you take the stand for just a moment.

WALTER H. MARSH (recalled).

(By Mr. Dodge:)

Q. 157. You were asked, Mr. Marsh, with respect to your knowledge concerning financial conditions of this agency, certain questions of that sort. Does your office in Boston have anything to do with the handling of the accounts?

A. No, sir, it does not.

123 Q. 158. So that——

A. It is simply a supply agency, a supply branch office.

Q. 159. So that whether a particular agency is making money or not falls outside of your own knowledge?
A. That is outside my knowledge.

Mr. Dodge: That is all.

Cross-examination.

(By Mr. Sullivan:)

X Q. 160. Mr. Marsh, what would be your duties with reference to this defendant corporation had it continued for nineteen months more to use the plaintiff's product,—what would you have to do?
A. I would see that its orders were filled; that it got its monthly supplies.
X Q. 161. And what does that mean,—you would see that it got them? What would you do? Go there and see that it had them?
A. The monthly orders, standing orders, are made up at the New York office and shipped to the Boston branch office for delivery.
X Q. 162. I see. So that obviously if the contract is not carried out you are saved that labor, aren't you, among others?
A. Yes, sir.
X Q. 163. You work on a salary, I take it?
A. I do.
X Q. 164. And somebody, apparently, in New York, on the distributing end, would have work to do during that nineteen months, outside of the factory, wouldn't they?
A. I don't know that I quite understand you.
X Q. 165. If the contract was carried out the goods would be sent from the factory to some distributing centre or stores, would they, in New York? Do you know that?
A. They are distributed from the main office, as I understand it, in New York.
X Q. 166. Then they come from a factory to the main office, do they?
A. I think that they are manufactured at the main office.
X Q. 167. They are. And is there a distributing force or organization separate from the factory?
A. I couldn't say as to that.
X Q. 168. Haven't you ever been there?
A. Yes, but I don't know the details in that particular branch.
X Q. 169. But, at any rate, it was an incident of your work
124 with this defendant to keep visiting them and taking up with them whether they got what was coming to them?
A. The same as——
X Q. 170. The same as you do with others?
A. The same as I do with others.
X Q. 171. That is what you are paid to do?
A. It is a matter of routine.
X Q. 172. That is what you are paid to do?
A. Yes, sir.

Mr. Sullivan: That is all.

Mr. Dodge: That is all, Mr. Marsh.

Now, if your Honor please, I want to make a more formal offer of the House and Senate reports on this Clayton Act. I have a collection of decisions of the Supreme Court of the United States——

The Court: I thought that they were already in.

Mr. Dodge: They have not been marked as exhibits, and I do not know whether they should be marked as exhibits, or should merely be called to your Honor's judicial attention, as aids to the judicial notice which your Honor will take of them perhaps. There are just certain parts that I wanted to put in,—the section of the act as it was reported, and the comment of the committee on it as it appears on pages 6 to 9 of the Senate report.

The Court: Is there any objection?

Mr. Sullivan: No, sir.

Mr. Noble: And also the House report.

Mr. Dodge: Yes, the House report also. Shall I have these marked as exhibits? These are copies which I borrowed from the United States attorney, and I would like leave to substitute other copies, which I can obtain elsewhere. There being no objection to the admission of the documents, I suppose that I need not refer your Honor to the authorities that such reports are competent on the question of the interpretation of the statute. You do not make any question about that, I understand?

Mr. Sullivan: No.

[The substitute copies of reports, when furnished by Mr. Dodge, will be marked as follows: "Report No. 627, House of Representatives, 63d Congress, 2d Session, to accompany H. R. 15,677",
125 will be marked "Plaintiff's Exhibit 15". "Report No. 698, Senate, 63d Congress, 2d Session, to accompany H. R. 15,677", will be marked "Plaintiff's Exhibit 16".]

Mr. Sullivan: I want to ask Mr. Scanlon one or two questions before you rest, if there is nothing else.

Mr. Dodge: There are certain figures that I want to put in through Mr. Scanlon. He has not tabulated them yet. Subject to that reservation, I am ready to rest.

Mr. Scanlon, will you take the witness stand?

JOHN T. SCANLON (Resumed).

Cross-examination.

(By Mr. Sullivan:)

X Q. 707. Just one or two questions, Mr. Scanlon, on the line I pursued yesterday. Where is your factory? Is it right in the same place that your distributing agency is?

A. Where we make the patterns, do you mean?

X Q. 708. Yes.

A. No; the factory is over in H Street, I think it is, or some such street, in a separate building from our main office.

X Q. 709. Absolutely distinct organizations, then?

A. Absolutely; yes.

X Q. 710. And are you in the same building with the Butterick people?

A. The offices are; yes.

X Q. 711. The distributing end?

A. The distributing end is in New York, in the same building.

X Q. 712. And is it the Standard building or the Butterick building?

A. It is known as the Butterick building.

X Q. 713. And do you rent from the Butterick people?

A. We rent from them; yes, sir.

X Q. 714. You really are a company the stock of which is owned by the Butterick, or the controlling interest?

A. No; the stock shares, the controlling interest in the stock shares of the Standard Fashion Company is held by a holding company.

X Q. 715. They also hold the Butterick Company?

A. They control the shares of the Butterick Publishing Company.

126. X Q. 716. How many do you employ in the main offices in New York?

A. In the distributing end?

X Q. 717. Apart from your factory, what is your organization?

A. It would be about, probably, two or three hundred.

X Q. 718. And they are engaged in the business of accounting?

A. Some.

X Q. 719. The financial end?

A. Some of them.

X Q. 720. The distribution of product?

A. Yes.

X Q 721. How many do you employ in the factory?

A. In the factory we employ probably one hundred or one hundred and twenty.

X Q. 722. So that really both numerically and as a matter of expense the factory is the inferior end of your business, isn't it?

A. The factory is not the inferior end, if I understand you correctly.

X Q. 723. As a matter of expense in a pattern, in the cost of a pattern, the factory cost is the smallest?

A. In the pattern itself?

X Q. 724. Yes.

A. Why, yes, the factory expense is smaller than the other expenses, I should say.

X Q. 725. And yet, as I got your testimony yesterday, you figured that the profits in a pattern are the difference between the factory cost and the price that the merchant sends you?

A. In this case that is a perfectly accurate figure.

X Q. 726. In this case?

A. Yes.

X Q. 727. That is, you don't load on to this contract any per

cent at all of what it would cost you, for instance, for Mr. Marsh to visit them?

A. There would be no extra expense of that kind.

X Q. 728. No extra expense?

A. No; it wouldn't affect our overhead, as I explained yesterday.

X Q. 729. Well, if a few more did what the Magrane people did you wouldn't need any Mr. Marsh, would you?

A. Why, not a few more, but if a few thousand more did we wouldn't.

X Q. 730. In Boston?

A. Oh, yes, we would need Mr. Marsh. He controls the entire New England business. He looks after the office that caters to the New England business in Boston alone.

X Q. 731. Suppose now Mr. Scanlon (to get it down to
127 where I can make myself clear), you had in your entire business only Magrane and two others, and they all signed contracts like this, and then all broke them, we will say, before you started to distribute, so that you didn't need any organization at all; do you still think that you would be entitled to the difference between the factory cost——

A. You will have to allow me——

X Q. 732. No. Just tell me if that is an intelligible question; is it?

A. It is not intelligible; no.

X Q. 733. All right. In charging Magrane 7½ cents for those patterns you have figured into it other expenses besides factory costs, obviously, haven't you?

A. In fixing our sales price, do you mean?

X Q. 734. Yes.

A. Surely.

X Q. 735. And when the contract is not carried out many of those costs are eliminated, are they not?

A. Not in a case where an individual contract is not carried out.

X Q. 736. Well, let us see. You, for instance, I assume, get a substantial salary, don't you?

A. Moderate.

X. Q. 737. It is a moderate one for your services, doubtless, but still you get it, don't you?

A. Yes, indeed.

X Q. 738. And you might, conceivably, in the course of the next two years, have to devote, we will say, one hour to the Magrane contract mightn't you?

A. I might; yes, sir.

X Q. 739. And your time even for an hour is not worthless, is it.

A. I think not.

X Q. 740. And, therefore, if they break their contract and pay you damages, you are saved that hour for example, aren't you?

A. No; I will be paid for devoting it to something else, in that case, incidental to the general business.

X Q. 741. You will bring in a profit to the company by the employment of that hour in some other part of the business?

A. Not necessarily.

X Q. 742. I am using that only illustratively; isn't that true?

A. The application of that reasoning is not true.

X Q. 743. Well, is that true? Is it true that you would use that hour profitably, using that merely as a symbol?

128 A. That being a supposititious case with reference to the future I can't say; I don't know.

X Q. 744. You are doing a lot of supposing in reference to the future here, aren't you, in this matter?

A. Oh, no.

X Q. 745. What?

A. Oh, no.

X Q. 746. Well, you are asking the court to give you damages on what is going to happen in the future, aren't you?

A. No, not exactly that.

X Q. 747. Based on the past?

A. Yes, based on the past.

X Q. 748. Well, now, you have a past, haven't you?

A. I think so.

X Q. 749. I mean a business past. I thought that you being a man I could ask you that. But you have a past in the business sense, which affords you a foundation for estimating, even with your modesty, what your services for one year are worth to this company, havent you?

A. That can be determined very accurately.

X Q. 750. Yes. And you concede, or admit, as the story goes, that they are worth something to the company?

A. My hours?

X Q. 751. Yes, every one of them.

A. Yes, every one of them.

X Q. 752. Now, isn't it unescapable, Mr. Scanlon, that you are not giving this defendant credit for some of the expenses that would go into the completing or carrying on of your contract with him, when you merely credit him with the factory expense?

A. I think I have figured that with absolute fairness, the way I did. His going on or not going on with the contract would not materially affect our overhead. You understand that that account is one of thousands.

X Q. 753. Exactly. But can't it be reduced to a percentage basis? I don't want to pay for the beautiful building in New York.

A. No. In all candor, I don't know how to do it, and I can't understand how it can be done.

X Q. 754. Since yesterday have you thought over the matter of the ratio of your profits to your sales?

A. No, I haven't given it much thought—practically none.

X Q. 755. And you still feel that there is no way in these

129 days of efficiency—you have got nobody in your plant that could tell you what that is?

A. Why, yes, I have seen it attempted, but, as I say, I am distrustful of that thing.

X Q. 756. What is that you distrust.

A. These manifestations of what you call efficiency.

X Q. 757. What manifestations have made you distrustful?

A. Why, they come to us with claims of what they will do for us, but, as I say, we are distrustful of them.

X Q. 758. No; I mean people in your own organization?

A. We have never had it done.

X Q. 759. You buy your paper in large quantities?

A. Yes.

X Q. 760. And your printing is done in large quantities?

A. Yes, by contract.

X Q. 761. Yes, but these little patterns?

A. The printing?

X Q. 762. Yes.

A. There is very little printing in connection with a pattern.

X Q. 763. No. So that somebody has figured for you, taking as a start the cost of these large paper contracts—somebody has figured it down so fine that he can tell you to a cent what it cost you for a little piece of paper pattern, hasn't he?

A. I know that.

X Q. 764. Well, somebody has,—you know that?

A. Well, I have done it myself.

X Q. 765. And yet you say that there is no one, yourself or anybody else in your office, that has figured down what the larger cost of that pattern is, namely, the overhead of your distributing and office establishment?

A. No, we haven't figured it, and as I say, I don't believe myself that it can be done.

X Q. 766. It is a definite thing, isn't it? Every year you know from your books what that establishment has cost your company?

A. The factory?

X Q. 767. No; the other.

A. Oh, as a whole, yes; surely.

X Q. 768. Have you got the figures with you?

A. No, I have not.

X Q. 769. And you say that it is impossible, having the gross amount that it cost for salaries, from you down, and for overhead, rent, following up contracts, etc.—you say that it is impossible,
130 knowing that figure, and the number of patterns, for instance, that knowing that figure, and the number of patterns, for instance, that you sold, to find out what the relation of one to the other is?

A. Absolutely, because the apportionment of overhead in each business would overlap in such a way that it would be utterly unreliable.

X Q. 770. Well, it is a fact that there is a cost on each pattern for overhead isn't it?

A. Unquestionably.

X Q. 771. And merely because you find it, as a matter of accounting, difficult to apportion that to a pattern, does not mean that you should charge somebody with a profit, does it, omitting that?

A. Yes, absolutely, in a case like this.

X Q. 772. In a case like this?

A. Yes. If I may comment on——

X Q. 773. I would rather you wouldn't.

Mr. Dodge: Why not let him say what he wants to? I shall ask him to if you don't let him.

Mr. Sullivan: Well, you may. I feel pretty guilty for letting him elaborate in the way that he did yesterday.

X Q. 774. You have testified in a great many cases, haven't you, Mr. Scanlon?

A. No, not many.

X Q. 775. In all the States?

A. Testified in court proceedings?

X Q. 776. Yes.

A. No.

X Q. 777. Well, your company seems to have bobbed up in a great many different States in this sort of litigation, doesn't it?

A. We have been the victims in a great many States of cases like this.

X Q. 778. The victims?

A. Yes.

X Q. 779. Always the victims?

A. Generally, when it was over; yes.

X Q. 780. And you answered, when you testified to Mr. Dodge about the contract of the other companies—you were speaking from what you felt to be a more or less accurate knowledge?

A. Yes.

X Q. 781. And when his Honor indicated that you might tell what you found to be the general run of them, you spoke
131 from knowledge that you had acquired as an incident of your business?

A. Yes, what I had acquired in the way of reliable information.

X Q. 782. Did you know that the McCall Company had eliminated this negative covenant, so-called, since the passage of the Clayton Act?

A. No, I didn't know it.

X Q. 783. Did you know that there is not a negative covenant in its contract now?

A. I didn't know that.

X Q. 784. Did you know that it does not now contain that negative covenant?

A. No.

X Q. 785. If so, that would affect materially your opinion as to what the general run of contracts was, wouldn't it, if there were 12,000 of those outstanding?

A. If it were so.

X Q. 786. Does the R. H. White contract have that in it?

A. Absolutely.

X Q. 787. Did you say that the McCall people have 12,000 agencies?

A. They claim to have 12,000. I think they probably have pretty near that number.

X Q. 788. Could you give the court any information as to the

comparative size of their agencies compared with yours and the Butterick?

A. Well, having 12,000 stores, as I think they have, approximately, against our 6,000, it follows that they have, probably, a great many more small agencies than we have.

X Q. 789. How many of them has the Butterick?

A. The Butterick has in the neighborhood of 10,000; under 10,000.

X Q. 790. That is 16,000 for the two allied companies?

A. Yes.

X Q. 791. How many has the New Idea?

A. About 4,000, or 3,800.

X Q. 792. That is an allied company?

A. That is an allied company.

X Q. 793. So that the combination of those three allied companies has about 20,000 agencies?

A. Yes, out of 52,000 pattern agencies in the country.

X Q. 794. You control directly about 20,000?

A. About 20,000. You are speaking of the Standard Fashion Company?

X Q. 795. I am speaking of the company that controls the three of them.

A. I doubt if that is an accurate statement.

132 X Q. 796. Is 20,000 accurate?

A. 20,000 is right, but I mean about our controlling the 20,000.

X Q. 797. Does the holding company control the three?

A. The holding company holds the stock shares of the three companies.

X Q. 798. The same officers?

A. No.

X Q. 799. Are you an officer in the holding company?

A. No.

X Q. 800. Are you a stockholder in it?

A. I am a director in it.

X Q. 801. A director. Well, that is an officer. How many directors are there?

A. Eleven.

X Q. 802. Some from the Butterick Company?

A. Yes.

X Q. 803. Some from the New Idea?

A. Yes.

X Q. 804. They are all represented on the board?

A. Yes.

Redirect examination.

(By Mr. Dodge:)

Q. 805. How long has that holding company held the stock of the Butterick Company and the Standard Fashion Company?

A. How long has the holding company held it?

Q. 806. Yes.

A. Since 1900, I think; about 1900 or 1901, somewhere along there—1899,—the year before, 1899.

Q. 807. And the New Idea since——

A. Since 1902 or 1903.

Q. 808. You spoke of the difficulty of apportioning the overhead expense, or the part of the overhead expense which naturally belongs to the pattern. What is the difficulty or peculiarity, if there is one, about your business?

A. Why, the inter-relation of the overhead to the publication, as well as the patterns, in my judgment, it is quite impossible to say where the overhead of any one end of the business begins or stops.

Q. 809. Whether or not the designers who are working upon the designs of patterns are also preparing illustrations for the publications?

A. Yes, that is true.

Q. 810. Does your company also publish a magazine wholly apart from its pattern business?

A. Yes; we publish a monthly magazine, The Designer.

Q. 811. The Designer. How many times, as a matter of fact, have you testified in court for the Standard Fashion Company?

A. I think this might be the third time.

133 Q. 812. You started to offer an explanation of some answer which you made to Mr. Sullivan. Perhaps you don't remember what you were starting to say then, but if you do I would like to have you say it now.

A. I had difficulty in getting my mind in agreeance with what was in Mr. Sullivan's mind, the applicability of the overhead to the damages in this case. Briefly, what I mean is that the furnishing of those patterns, the making of them or not making of them, will not affect our overhead one cent, one way or the other,—the general overhead. If we were called upon to make them, we would have the factory cost added to what we would otherwise have; if we were not called upon to make them, we would not have that factory cost.

Q. 813. You spoke of its being difficult to apportion the overhead between the factory and the office, and you said that some of the employees in the manufacturing end are employed in the office?

A. Yes.

Q. 814. Are the designers of the patterns employed in the office?

A. Yes.

Q. 815. And not in the factory?

A. No.

Mr. Dodge: That is all.

Recross-examination.

(By Mr. Sullivan:)

X Q. 816. Have you figured in the discards?

A. The discards?

X Q. 817. When you say that the cost is two cents, have you figured in the discards in that?

A. Why, I think that would take care of the discards reasonably.

X Q. 818. Are you sure?

A. I can verify that, satisfy myself of that, in a very few minutes.

X Q. 819. But you are giving yourself a little the best of it, probably.

A. I think not, in all probability.

X Q. 820. You think not?

A. Yes.

X Q. 821. What would they amount to in a year?

A. The discards?

X Q. 822. Have you ever found out what the percentage is?

A. Of the discards?

134 X Q. 823. Yes.

A. In the case of the Magrane Houston Company, yes, I have the exact figures.

Mr. Sheehan: He put in the exact figures.

X Q. 824. You put in what they had been?

A. Yes.

X Q. 825. You haven't got in your mind what proportion or what percentage is charged off, have you, for discards on your whole business?

A. Charged off for discards?

X Q. 826. To what extent the cost of your patterns is affected by discards.

A. Oh, I should say a small fraction of a cent on a pattern.

X Q. 827. Well, I am still curious, Mr. Scanlon, to know how you know that 7½ cents will cover you when you sell a pattern?

A. Well, right at the present time 7½ cents might not cover it, you see.

X Q. 828. No; but how do you know it is that rather than ten or fifteen?

A. Well, I explained to you that the market is in a transition state now, where we really may have to figure on some further readjustment of the retail prices.

X Q. 829. How do you know? What readjustment if you don't figure into each pattern your overhead and distributing expenses?

A. Why, it's this way: The tissue paper we buy thousands of reams a year of, use thousands of reams, and we know what that costs now. We have some idea what it may cost us within the next year. If it is going to add substantially to the cost, we may have to increase the retail price of the patterns in order to get back the increased cost.

X Q. 830. Well, supposing salaries are doubled, what then? Does that affect the cost of your patterns?

A. I don't myself entertain that thought at all.

X Q. 831. Supposing that to be true, just as a pleasant dream,—supposing that all salaries go up with other wages? Wages are going up, aren't they?

A. In some departments, yes.

X Q. 832. Well, will you add that on to the patterns?

A. It depends on which department is affected.

X Q. 833. If it is the pattern department.

A. We would have to.

X Q. 834. In other words, you have got some way in which
135 you arrive at 7½ cents at the proper selling price of that pattern other than merely figuring the factory cost as two cents?

A. That is developed from an experience of thirty years, not from any present immediate calculation.

X Q. 835. I understood that you said that there is not very much profit in the other end of your contract with Magrane?

A. What do you mean?

X Q. 836. The publications.

A. In the fashion sheet there is quite a good profit.

X Q. 837. Is that true, that there is a profit in those?

A. Oh, yes.

X Q. 838. Isn't it recognized in the business that there is not?

A. That there is not a profit?

X Q. 839. Yes.

A. Oh, no. We sell those at 7.50, and they cost us 4.80.

X Q. 840. Is that factory cost?

A. Under contract.

X Q. 841. Is that the printer's charge?

A. That is the printer's charge.

X Q. 842. When you say they cost you 4.80, there is no addition in that for your salary or overhead?

A. Nothing goes into that of that sort.

X Q. 843. Is there anything that you figure overhead into?

A. Yes.

X Q. 844. What?

A. The whole business.

X Q. 845. And each part, the fashion sheet, the magazine, and the pattern, bears its proportionate share, doesn't it?

A. No. There is where my difficulty is. I have never been able to satisfactorily apportion the overhead to the different branches of business.

X Q. 846. And you haven't made any effort to in preparation for this trial?

A. No.

X Q. 847. Do you yourself print these patterns, print what is printed on them?

A. No, we don't print them.

X Q. 848. Or is there anything printed on them?

A. Yes, there is something printed on them.

X Q. 849. Do you print that [placing before the witness Plaintiff's Exhibit 5]?

A. No; we have that printing done for us.

136 X Q. 850. Do you cut them?

A. Oh, yes; we manufacture the patterns.

X Q. 851. You don't let out the cutting to somebody else; you manufacture the patterns?

A. Yes, sir.

X Q. 852. The shape?

A. Yes.

X Q. 853. And the head designer designs for the Butterick Company also?

A. Oh, no; that is an entirely different organization.

X Q. 854. Aren't there one or two designers at the top that design for all those three companies?

A. Oh, no, no. We are very careful to avoid that.

Mr. Sullivan: That is all.

Mr. Dodge: That is all, Mr. Scanlon. Subject to the reservation which I mentioned, we rest.

Evidence for Defendant.

ALFRED JOHN ROTHEROE (sworn).

(By Mr. Sullivan:)

Q. 1. Will you give us your full name?

A. Alfred John Rotheroe.

Q. 2. And where do you live, Mr. Rotheroe?

A. New York City.

Q. 3. And you are employed there in what capacity?

A. I am with the McCall Company as auditor and assistant treasurer.

Q. 4. How long have you been in the employ of the McCall Company?

A. Thirteen years.

Q. 5. In that same capacity?

A. For eleven years; yes.

Q. 6. And prior to that did you have any connection with the pattern business, so-called?

A. Before going to the McCall people?

Q. 7. Yes.

A. No.

Q. 8. The McCall Company that you refer to is the pattern company that we have been discussing here?

A. Yes.

Q. 9. And they are a large competitor of the Standard-Butterick-New Idea combination?

A. Yes.

Q. 10. And what is their general style of agency or contract? How do they do business?

A. By printed contract.

Q. 11. I know. But by placing their product under contract in dry good stores, retail dry goods stores?

A. Yes.

137 Q. 12. Wholly in dry goods stores?

A. No, not entirely.

Q. 13. In some other kinds of stores?

A. Yes; we have them in all kinds of stores,—stationery stores if we can't get dry goods stores.

Q. 14. And all over the United States, I take it?
A. Yes, and Canada.
Q. 15. Is most of their work done under written contract, or printed contract?
A. Yes; entirely.
Q. 16. What is your relation to the contract end of it in the course of your duties there?
A. I accept or reject the contracts that come in.
Q. 17. So that they come immediately under your inspection and supervision?
A. Yes, all contracts.
Q. 18. And are you familiar with the form of them?
A. Yes.
Q. 19. Do you know the form of the Magrane contract?
A. Yes, sir.
Q. 20. I show you that, and ask you whether that is the form that is in common use by the McCall people [passing a paper to the witness]?
A. Well, no, it couldn't be said to be in common use at this time. We are replacing our old contracts with those, signing up new ones, but we have a lot of outstanding contracts under the old form,—unexpired contracts.
Q. 21. Is this the one that is now being used?
A. Yes.
Q. 22. In 1917?
A. Yes.
Q. 23. And there is no negative covenant in this one that no other patterns shall be used in the store, is there, that you can see?
A. No. We eliminated those on account of——

Mr. Dodge: No. Just a minute.

Q. 24. When were those eliminated?

Mr. Dodge: Do you mean when was the new form, without that in it, first used?
Mr. Sullivan: Yes.
Mr. Dodge: I do not understand that it has been eliminated from the old contracts.
The Witness: We could not very well eliminate it from those.

Q. 25. But the new contracts that you have been making
138 this year, for instance?
A. It was either in the late fall of last year or early in this year. I personally had been agitating it for a long time, because our contracts——
Mr. Dodge: You are asked simply when it was.
The Witness: It was either the last of last year or the first of this year; we had discussed it so long a time that, honestly, I couldn't remember.
Q. 26. Did the old contracts have the negative covenant that the agents should not have any other patterns in their stores?
A. Yes, and other restrictive clauses, too.

Q. 27. Do you recall any other restrictive clauses which have been omitted from the so-called new contracts that were in the old?
A. Yes.
Q. 28. What?
A. We had a clause requiring the dealer not to sell for other than the labeled retail price marked on it.
Q. 29. That has been changed, has it?
A. Yes; and we insisted on their keeping the patterns on the first floor. We took that out.
Q. 30. You took that out?
A. Yes.
Q. 31. How many contracts have you of all kinds?

Mr. Dodge: Will you read me what he said about what they insisted on?

[The reporter reads as follows:]

"A. We had a clause requiring the dealer not to sell for other than the labeled retail price marked on it.
Q. 29. That has been changed, has it?
A. Yes; and we insisted on their keeping the patterns on the first floor. We took that out.
Q. 30. You took that out?
A. Yes."

You took that out, and the negative covenant, and was there any other thing that was taken out?
The Witness: The price.
Q. 32. Why were those things taken out?

Mr. Dodge: I object.
The Court: Why do you offer it?
Mr. Sullivan: To show that they were taken out with reference to the passage of this act.
The Court: That is their opinion?
139 Mr. Sullivan: Yes, sir.
The Court: Some others might interpret it otherwise. Do you confine it to this company?
Mr. Sullivan: No.
The Court: Then why inquire into it?
Mr. Sullivan: Mr. Scanlon has testified to the general use of covenants contained in contracts like the one in suit. We offer to show that that is not so, and has not been so since immediately after the passage of the Clayton Act, and we want to show how that act operated upon this company as a basis for the argument that his statement that it is in general use ought to be entirely discredited.
The Court: That is, your purpose in offering this testimony is not to meet the statement or evidence of Mr. Scanlon, but you offer it, you say, for the purpose of showing the interpretation placed upon the Clayton Act by the McCall Company,—that is your purpose in offering it, isn't it,—not the other?
Mr. Sullivan: That is exactly the purpose,—for the very purpose

of affecting Mr. Scanlon's credibility in the whole affair, and the accuracy of his statements.

The Court: It might be admissible upon that ground, but not upon the other.

Mr. Dodge: The reasons why have no bearing on that.

The Court: Mr. Scanlon did testify as to a general custom of the pattern manufacturing companies to include in their contracts this negative agreement that no other patterns should be sold in the store,—that that was the general custom. Now, as bearing upon his testimony, that statement in it, you may show that the McCall Company pursued another course.

Mr. Sullivan: Well, there being nobody's mind here to be affected but your Honor's mind, I should not feel that it was very important to me to show what the McCall people thought of it, as affecting your mind.

The Court: Along the other line, as to the interpretation placed upon the Clayton Act by the McCall Company, and by this witness, that seems to be objectionable.

140 Mr. Sullivan: I think it is, on reflection. What I really had in mind, if your Honor will pardon me a further word, was that, before the passage of the Clayton Act was so well known a thing, it was a matter of discussion, as the witness said, and it might be competent to show that there was discussion in this company, as a basis for the argument that there probably was in all companies, and that Mr. Scanlon knew it, and that discussion resulted in definite action being taken by others. That I am not able to prove except by inference. However, I would rather waive it than have an exception on it, I think.

Q. 33. At any rate, how many do you think of these new forms are in existence out of the twelve thousand,—how many have you supplanted? Have you any way of telling, roughly?

A. I should imagine between 350 and 400.

Q. 34. Now, are you doing it as fast as they expire?

A. Yes, on the new contracts that we obtain.

Q. 35. That is, you have permanently, or at least for the present, discarded the old form of contract containing the covenants that we have talked about?

A. Yes.

Q. 36. Do you know of any other company of those that are leading companies that has made such a change?

A. No, I don't, but I am not very familiar with their contracts.

Q. 37. With the other contracts?

A. Yes.

Q. 38. Now, in the course of your duties as auditor, what relation do your position and the duties attendant upon it have to the figuring of cost?

A. I control the figuring of cost.

Q. 39. What do you mean by controlling it? Do you do it?

A. No; I direct how it shall be done.

Q. 40. And do you know the Butterick-Standard-New Idea combination?

A. Yes.

Q. 41. And do you know their patterns, as an incident of knowing your own work,—know them when you see them?

A. No, I don't think I do. I don't know much about that.

Q. 42. You don't know much about the practical side of the patterns?

A. No.

Q. 43. But you know in a general way, do you, that the product is marketed about the same as yours is?

A. Yes, I believe so.

141 Q. 44. And that the patterns, in a general way, so far as their make-up goes, are like yours?

A. Very similar.

Q. 45. And that they operate under written contracts?

A. Yes.

Q. 46. Now, do you have a factory?

A. Yes.

Q. 47. Is it distinct from your distributing end?

A. No; it is all in the same building.

Q. 48. All in the same building?

A. Yes.

Q. 49. You have a large distributing end, I suppose, a selling, and an accounting, financial, department, and all the usual apparatus that goes with a big business?

A. Yes.

Q. 50. Are the results of the cost figurer's work handed in to you?

A. Yes.

Q. 51. And you determine the cost?

A. Yes.

Q. 52. Is it determined what the cost of each pattern is?

A. Yes.

Q. 53. So that you can tell in your business what the cost of each pattern is?

A. Yes, except for an element of uncertainty in regard to one of the items of cost, that is, the discard item.

Q. 54. The discard item?

A. It is impossible to actually get that.

Q. 55. Until it happens?

A. It is never in such a condition that you can get it. I should be glad to explain that if——

Q. 56. I am going to give you a chance in a moment. Passing for just a moment the element of uncertainty, and taking up what is certain, what is certain in the cost of a pattern?

A. The cost of the material and labor.

Q. 57. And what is the labor?

A. The labor in the cutting department and the designing, and every class of labor.

Q. 58. I want to get the way in which your patterns are figured. Can you tell what the ratio of annual profit is to annual sales?

A. Yes.

Mr. Dodge: What is that?

[The reporter reads as follows:]

"Q. 58. I want to get the way in which your patterns are figured. Can you tell what the ratio of annual profit is to annual sales?
A. Yes."

142 Q. 59. And in getting that do you figure in the expense of your distributing and financial and accounting end?
A. Everything goes in.
Q. 60. Rent and everything else?
A. Everything.
Q. 61. That is figured in a definite system, is it?
A. Yes.
Q. 62. Of accounting?
A. Yes.
Q. 63. So you can tell from your books at any time what per cent of profit there should be in any given amount of sales, other than this discard item?
A. What there should be?
Q. 64. Yes.
A. Yes.
Q. 65. Now, what is the trouble about discards? What does it mean, and how does it make unstable the figuring of cost?
A. There is a liability on every pattern that goes out, until that pattern is sold over the counter by the dealer—there is a liability that the manufacturer may be called upon to replace that pattern one or several times. Ultimately it is bound to come back as a discard.
Q. 66. Is there any other element of uncertainty that you know of, when you know that there has been a sale of a pattern, in figuring up what the profit is?
A. No, I don't know of any.
Q. 67. So that would—you say that it is possible, from your experience, to take any given sale and tell in your company what the profit is?
A. Yes.
Q. 68. Do you know about the situation in the trade within the last year or two as to whether there has been any fundamental change, so-called, in it?
A. Fundamental in what regard?
Q. 69. With reference to the cost of raw materials, or anything of that kind?
A. Their earning capacities?
Q. 70. No. Has there been a downward or an upward change, or is it stable?
A. Upward in cost.
Q. 71. And how long has that movement persisted now?
A. It started soon after the—probably after the end of the first year of the war. Tissue paper is the thing most affected, and that is going up yet.
Q. 72. There has been no diminution in the movement,—the upward movement?
A. Not to my knowledge; no.

143 Q. 73. That, of course, has affected the cost?
A. Yes.
Q. 74. And prices to the consumer?
A. Yes.
Q. 75. And has that condition affected sales, have you observed, throughout the trade generally?
A. That the pattern companies have increased their price, do you mean?
Q. 76. Yes. Has the increase in prices increased or diminished the number of sales of patterns?
A. It would be very hard to say whether any increase or diminution in the sales at this time would be due to any increase in the prices of the patterns, on account of the abnormal conditions by reason of the war.
Q. 77. Is it known in the trade to experienced men like yourself and Mr. Scanlon that there is a diminution in sales generally in the number of patterns sold?
A. No, I shouldn't think that there is a decrease in sales.
Q. 78. It is about the same?
A. Yes. I have recently investigated it very thoroughly, because surface indications seemed to be that there was a decrease, but on going into it deeper I was satisfied that there was not a decrease.
Q. 79. In your company?
A. In our company. You see you can't tell what your sales are unless you know what every man's stock is that is outstanding. It is either there or sold; you can't tell.
Q. 80. And it may come back to you, for all you know?
A. Yes.
Q. 81. Do you know the Standard organization at all? Have you ever been there?
A. No, I have never been there.
Q. 82. Well, do you know what is the usual profit in the trade on patterns under present conditions?

Mr. Dodge: Just a moment.
The Court: I do not suppose that their profits would be competent.
Mr. Sullivan: I suppose that their profits would not be controlling, because there might be things which would make them more or less efficient.
The Court: If there is objection made, I do not see how I can admit what the profits of the McCall Company were as compared with the Standard.
144 Mr. Sullivan: The question was a little broader than that. The question was what, from his experience, would he say would be a fair possible profit on a pattern in the trade, under present conditions.
The Court: He has testified that he knows nothing about the Standard organization, plant and factory. Is that true?
The Witness: Yes, sir.
The Court: How can he furnish any information, then, as to what their profits are?

Mr. Noble: I think that he said also that he had no experience in the pattern business except with the McCall people.

The Witness: That is right.

Mr. Sullivan: Just a minute. He said that he was familiar with the general nature of the Standard business, what they sold and how they sold. However, your Honor has ruled——

The Court: Under objection, I do not think that I will admit it.

Mr. Sullivan: May I make an offer of proof, to save my rights?

The Court: Yes.

Mr. Sullivan: I understand that he would say that the utmost margin would be ten per cent, if your Honor will save my rights on that.

The Court: Yes.

Q. 83. Are you a stockholder in the Standard?

A. No. I have a little Butterick stock.

Q. 84. Butterick stock?

A. I am sorry to say.

Q. 85. Why sorry?

A. They haven't paid any dividends for some time. I bought it at 28½, and yesterday it was quoted at 10½.

Q. 86. I guess the market didn't know about Mr. Scanlon's system of profits? Have you got any stock in the Standard?

A. I think they have——

Q. 87. Are you in the holding company?

A. I think that that is all the stock they have. I guess that is the only one that is listed, the Butterick.

Mr. Dodge: The stock that is on the market is the Butterick Company stock, isn't it, the holding company?

The Witness: Yes.

145 Q. 88. The subsidiaries are not quoted,—it is the holding company?

A. The holding company.

Q. 89. Do they pay dividends?

A. The Butterick? No; they have not this year.

Q. 90. Does your company pay dividends?

A. We haven't paid a dividend since October, 1916.

Q. 91. Did you before that?

A. Yes, on our first preferred.

Q. 2. And since then, not even on the first preferred?

A. No.

Q. 93. That is due to the abnormal conditions, is it?

Mr. Noble: How can he express an opinion on that, if the Court please?

Mr. Dodge: I object.

Mr. Sheehan: I object

Mr. Sullivan: The uniformity of objection here is rather appalling,—objections coming from all three gentlemen. I thought that perhaps you might, by sitting there all day and figuring, be able to tell us why you didn't pay a dividend even on the first preferred stock.

Mr. Dodge: I object.

Mr. Sullivan: If it was due to general conditions in the trade, wouldn't it be material?

Mr. Dodge: The only thing that is material is whether the company is making monopolistic profits

Mr. Sullivan: They are all affected, apparently, by the same conditions. That is all.

Cross-examination.

(By Mr. Dodge:)

X Q. 94. I was interested in your statement, Mr. Rotheroe, that you could figure a percentage of your profits upon the sales of patterns. That is what you said?

A. Yes.

X Q. 95. You sell a good many other articles, I see, besides patterns; that is, you sell fashion sheets, do you not?

A. Yes.

X Q. 96. You sell the McCall Complete Catalogue?

A. Yes.

X Q. 97. The Ready Reference Catalogue?

A. Yes.

X Q. 98. The McCall Book of Fashion?

A. Yes.

X Q. 99. McCall's Embroidery and Needlework Book?

A. Yes.

X Q. 100. McCall's Monthly Magazine?

A. Yes

146 X Q. 101. Pigeon-hole cases?

A. Yes.

X Q. 102. Drawer cabinets?

A. Yes.

X Q. 103. And counter-book covers?

A. Yes.

X Q. 104. And in order to apportion your profits to sales of patterns, of course you have got to apportion a great variety of overhead expenses among these different articles?

A. Yes.

X Q. 105. And do you also figure the profit that you make on the pigeon-hole cases, for instance?

A. Well, we don't figure the profit on the pigeonhole cases alone. That is included with the cabinets, what we call sundry merchandise, anything in the way of fixtures, or rubber stamps, that we buy for people to sell, other dealers, that is not of our own manufacture.

X Q. 106. You lump several articles together?

A. Yes.

X Q. 107. Do you apportion a part of the president's salary to those articles?

A. Yes.

X Q. 108. By some orderly method of division?

A. Yes.

X Q. 109. Of course it is impossible to determine just what fraction of the president's time, for example, is devoted to these different things?

A. Yes; it has to be more or less arbitrary.

X Q. 110. And it is the same way with all other items of overhead expense, isn't it, such as rents?

A. It is not entirely arbitrary, because we take the floor space that is used for these particular purposes and gauge it by that.

X Q. 111. There are various items as to which there has to be a more or less arbitrary division, of course?

A. Yes.

X Q. 112. If you are going to make an apportionment of that sort?

A. Yes.

X Q. 113. Now, there seems to be, under this form of contract, some limit upon the right of the retail dealer, special agent as you call him, do you not?

A. Yes.

X Q. 114. A limit upon his right to return discarded patterns. There is a limit upon his right, isn't there?

A. Do you mean the length of time within which he has to return them?

X Q. 115. Both the length of time and the quantity that he may return?

A. No, I don't think so. The quantity is apt to vary all the time. It wouldn't be embraced in the contract.

147 X Q. 116. Well, your right of exchange is somewhat different from that of the Standard Company? I am trying to get at that. You have a right to refuse to allow the agent to return patterns to you unless you have declared them to be discarded?

A. Yes, that is true.

X Q. 117. That is true. A semi-annual return?

A. Yes, but we discard the same number of patterns that we put in; the same number that we issue of new business.

X Q. 118. You discard the same number?

A. Yes.

X Q. 119. The contract speaks for itself. I would like to offer this. This does not seem to have been endorsed as approved and accepted by the McCall Company, in the lower left-hand corner, but it is signed by the McCall Company?

A. I imagine that the Magrane Houston Company have another copy of this contract which is properly executed. This was probably left by the traveler when he was here.

Mr. Sullivan: I thought that was our copy. It is a replica in every way.

Mr. Dodge: Well, let us have it marked.

[The contract between the McCall Company and the Magrane Houston Company, dated "2/2, 1917," is marked "875 Eq., Pl'ff's Ex. 17, J. E. G., Jr., Dep. Clk., 11/28/17."]

X Q. 120. Is this the only form of pattern contract that you are now using with new agents?

A. As to terms, yes; that is, general terms.

X Q. 121. Well, you make variations with different agents?

A. Yes, but not as to any special clauses, that is, these restrictive clauses, if that is what you are asking about.

X Q. 122. Those are all out now?

A. The quantities and terms.

X Q. 123. Those vary of course?

A. Yes.

X Q. 124. But is it the only printed blank that you are using now?

A. Oh, no; we have six or eight different forms of contract for different size deals and different conditions; but we have cut out all those restrictive clauses from all of them.

X Q. 125. Those three clauses that you have spoken of?

A. Yes.

148 X Q. 126. You haven't any other of your printed forms here with you, have you?

A. No, I haven't.

X Q. 127. Now, you say that of your 12,000—is that the number?

A. Well, I don't say under oath how many we have, because I couldn't in the first place, and I don't think it is very material, is it?

X Q. 128. Of your many thousands of agents, all but about 350 are operating under contracts which contain these restricted clauses?

A. I think there were about 258 renewals which I made on our new terms, and I am speculating on about 150 contracts——

X Q. 129. Three hundred and fifty to four hundred, and you used those only in cases where you had a new contract?

A. Yes, either for renewal or a new contract.

X Q. 130. That is, in the case of your old contracts, which have run along, although the term of the contract has expired, you haven't called those in to issue a new form?

A. No. As fast as we could we have gone around, in some cases two years before the expiration, to get them to use the new contracts.

X Q. 131. The new form was used only where there was a new contract, or where the old contract had expired?

A. No; we did it in the case that I have just described.

X Q. 132. How many of the 11,000 agents, assuming that there were 11,000, who were operating under the old form of contract are now operating under conditions which enable them to terminate the contract, or you to terminate it, on three months' notice?

A. We don't accept a contract that has a condition to terminate in three months,—a term and three months.

X Q. 133. Yes, a term and three months.

A. But you didn't say "a term."

X Q. 134. My question was meant to be this: How many of

your 11,000 agents who were operating under the old form of contract are now operating, after the expiration of the original term and during a period when apparently if the clause is the same as here three months' notice will terminate their relations with you——

A. Well, if we have any, we have overlooked them, that
149 is all, because pattern contracts are renewed two or three years in advance of the expiration.

X Q. 135. You are one of the concerns that sell patterns to the Marshall Field store?

A. Yes.

X Q. 136. And there is some other pattern besides yours being sold there?

A. Yes; the Home, I think.

X Q. 137. Or is it the fact—there was some testimony about that yesterday—is it the fact that your company pays the Marshall Field Company something for the privilege of having an agency with them?

A. No, that is not the fact.

X Q. 138. It is not the fact?

A. No.

X Q. 139. You do get some return from that agency?

A. Yes, we do.

X Q. 140. It is not all outgo?

A. No, not at this time.

X Q. 141. Of your 350 agents who are operating under this new form of contract, how many are handling a second pattern besides yours, today?

A. I couldn't even make an intelligent guess at that, but it is becoming more or less general, I think, with stores of any kind. Some are handling three.

X Q. 142. The May Manton?

A. No; I say that some are handling three.

X Q. 143. Can you name any agency outside of the Marshall Field store, and possibly one or two very large stores of that character,—can you name any agency that is today handling any pattern besides yours?

A. Yes. I don't think that that is a fair question without giving me time for preparation on it, but I can give you Macey and Abraham Strauss of Brooklyn. They both handle two, and they were considering putting in four, but whether they did or not I can't say.

X Q. 144. Outside of those two, can you name any other large store in Chicago or New York that is doing it?

A. No; I am not familiar with them.

Redirect Examination.

(By Mr. Sullivan:)

Q. 145. You say that it is becoming increasingly common to carry more than one pattern?

A. Yes, we think it is, and we thought that that clause had no
150 effect, no value for us, in our contract, and it has distinctly hurt us by the States not allowing us to sue under our contract——

Mr. Dodge: I ask that that be stricken out. I could not quite understand it, whether it was an opinion on the law, or what it was, but it was not responsive to the question, anyway.

The Court: Is there any objection to striking it out?

Mr. Sullivan: It was not responsive.

The Court: Strike it out.

Q. 146. How did it come to your attention that it was becoming increasingly common?

A. By our travelers reporting that it was, I judge.

Q. 147. In the figuring of the cost, what do you figure discards at?

A. Our figure comes to about 2¼ cents per pattern.

Q. 148. Above the factory cost?

A. Yes.

Mr. Sullivan: That is all.

The Witness: I shall be glad to state how that is arrived at if anybody wishes to know.

Mr. Sullivan: All the witnesses seem to be willing to help out. We may as well not limit you at this stage. How do you arrive at it?

The Witness: Our discards for an entire year at this time amounts to between three hundred fifty and four hundred thousand dollars, which divided by the number of patterns that we sell for the entire year gives the quotient of 2¼ cents, and that is as near a way of arriving at it as any that I can see.

Mr. Dodge: You take them back at 100 per cent?

The Witness: Some contracts and some at 90. Our stock limitation contracts are 100 and the others 90. We have about 2,000 stock limitation contracts, and they are all at 100.

Mr. Sullivan: That is all.

Recross-examination.

(By Mr. Dodge:)

X Q. 149. Well, if I understand you, the patterns that come back are, of course, valueless, except as waste paper?

A. Yes.

X Q. 150. You agree with Mr. Scanlon on that?

A. Yes; they are thrown down the chute.

151 X Q. 151. So that the pattern that comes back and is figured by you at two and a fraction cents is a pattern that is of no further use to you as a practical matter?

A. And we give them credit for it, or give them another pattern in place of it.

X Q. 152. But the pattern that comes back you charge off at the figure that represents its cost to you.

A. Yes.

X Q. 153. You don't take into consideration at all the patterns that are not returned to you within thirty days as the contract provides—not exchanged within thirty days?

A. Is that in regard to discards?

X Q. 154. Yes.

A. Is it?

X Q. 155. "Credit bill to be issued to us within thirty days after receipt by you of discarded patterns."

A. After receipt by us?

X Q. 156. Yes.

A. That doesn't limit their time of the return; that limits the time for them to get a credit note. We are taking them back now that should have been back immediately after the first of July.

Mr. Dodge: That is all.

Mr. Sullivan: That is all.

CHARLES A. HANLEY (sworn).

By Mr. Sullivan:

Q. 1. Will you give us your full name?

A. Charles A. Hanley.

Q. 2. You are the general manager of the defendant company's store, are you?

A. Merchandise manager.

Q. 3. And were you at the time of the entering into this McCall contract?

A. Yes.

Q. 4. And did you know about the plaintiff, the Standard people, having a department there in your store?

A. Yes.

Q. 5. Did you look up about the sales?

A. Yes.

Q. 6. During the two years. Can you tell the court whether they were increasing or diminishing?

Mr. Dodge: Now, just a moment. Have you got your books here?

Mr. Sullivan: No; but he has looked it up and knows.

152 Mr. Dodge: I do not propose to permit such evidence to go in without objection unless he has got the books here.

The Court: If the witness knows whether the sales increased or decreased——

Mr. Dodge: Only from an examination of the books——

The Court: He says he knows. I do not know what his source of knowledge is.

Mr. Sullivan: It is something that you can easily check up. You have your books of sales?

Mr. Dodge: We have.

Mr. Sullivan: You can confront him.

Mr. Dodge: I do not suppose that the witness has anything to do with the actual selling of the patterns.

The Court: He is in charge of the department, I understand.

Q. 7. You keep in touch with the sales in Boston?

A. Yes; I see the sales every night.

Q. 8. Were they increasing or diminishing at the expiration of the two years?

A. They were diminishing.

Q. 9. And are you able to say——

The Court: Well, that is in the case of the patterns, of course.

Q. 10. That is patterns?

A. Yes.

Q. 11. And what about the publications?

A. The general business, the total business of the pattern department, was all figured in one.

Q. 12. I see. So that you were not able to tell which end of it was suffering?

A. No.

Q. 13. But you did know that there was a diminution in the business?

A. Yes.

Q. 14. Was that before you heard of the R. H. White agency that you noticed that?

A. That was about the same time.

Q. 15. Then you learned of the R. H. White agency?

A. Yes.

Q. 16. Did you talk with Mr. Marsh at all.

A. Yes.

Q. 17. And then decided, when you found that out, to give up the contract?

Mr. Dodge: Wait a minute. I object.

Q. 18. Well, did you know about R. H. White's dickering with them when you gave up the contract?

A. Yes.

153 Q. 19. During the time that you say that you had it, for two years or more, and while this diminishing was in progress, White had no agency, as I understand it?

Mr. Dodge: You are elaborating a great deal on what he said. He has said that at the end it was diminishing and that is as far as he has gone.

Q. 20. How long had it been diminishing?

A. The second year showed quite a difference from the first and the last five months showed much greater loss than the second year even.

Q. 21. Now, since you have given up the contract are there calls for Standard patterns?

A. Yes.

Q. 22. And have you issued any instructions with reference to Standard customers?

A. Yes.

Q. 23. What?

A. That they should direct—that our clerk should tell the customers where they could get it, because we—he accepted money for the subscriptions, and we had to see that the orders were filled, in courtesy to our customers.

Q. 24. You took money from your customers for subscriptions to some of these publications?

A. Yes.

Q. 25. And when they would come in to inquire, you would send them over to White's?

A. Yes, if they inquired for anything that they wanted.

Q. 26. If they inquired for what?

A. If they inquired for the patterns or publication, either.

Q. 27. That is about all that you know about it, Mr. Hanley?

A. That is all.

Mr. Sullivan: That is all.

Mr. Dodge: No questions.

PATRICK B. MAGRANE (sworn).

By Mr. Sullivan:

Q. 1. Patrick B. Magrane, is it, Mr. Magrane?

A. Yes, sir.

Q. 2. And you are the treasurer of this defendant corporation, are you?

A. Yes, sir.

Q. 3. And are you there at the Boston store a good deal?

A. From four to five hours a day.

154 Q. 4. And, in a general way, did you know about the condition of the pattern department when the Standard people had charge of it, when you were using their patterns, about the sales, etc.?

A. Well, I would see the sales nightly almost; I would get reports at night.

Q. 5. Do you know whether what Mr. Hanley says in regard to the sales is correct, that the sales were diminishing.—was that your impression?

A. Yes.

Q. 6. And then you learned of the White contract, did you, at some time?

A. Yes, I have heard it spoken of; yes.

Q. 7. That something was going on for the installation of the Standard at White's?

A. Yes.

Q. 8. And apparently it is not important, but you read the contract to be that you could give a three months' notice.

A. Yes.

Mr. Dodge: I object.

Mr. Sullivan: I don't think that it is important, but that is the fact.

Mr. Dodge: I don't think that it is competent, whether it is important or not.

Mr. Sullivan: It is not strange that he read it that way, or that anyone else would.

Q. 9. At any rate, under your orders, notice was given discontinuing it, or attempting to?

A. Yes.

Q. 10. And the goods were shipped back that Mr. Scanlon has testified to?

A. Yes.

Q. 11. And I understand from talking with you, without going into any detail, the amount that he has stated is substantially correct, is it,—the credit would be $788.73?

A. That is what I have learned.

Q. 12. So far as you can investigate at the store, that is substantially correct, is it?

A. That is substantially correct; yes.

Q. 13. We had it eight hundred and a few dollars, but it is not worth talking about. That is all that you know about the incident?

A. That is all.

155 Q. 14. That is only one phase of your activities there, I suppose, this pattern business,—you left it to some subordinate a good deal?

A. Yes.

Q. 15. That is, in investigating about this credit, you found from your books that if this credit were given it would about square the account?

A. That about squares the account.

Q. 16. I am not speaking now of any possible damages, but of the actual account, the $500 credit, and the goods sold that were returned,—one about offset the other?

Mr. Dodge: What good does it do to say that they about offset. Of course one is a little over eight hundred dollars, and the other is a little under. I do not understand that he is contradicting the exact figures which have been put in.

Mr. Sullivan: That is all, I think.

Cross-examination.

By Mr. Dodge:

X Q. 17. Just one question. Mr. Wilson was the man who negotiated the original contract with the plaintiff in your behalf, wasn't he,—Mr. Charles H. Wilson?

A. I am not sure.

X Q. 18. He was at that time, in 1914, the manager of your Boston store?

A. No, sir.

X Q. 19. What was he?
A. He was the head bookkeeper.

Mr. Dodge: That is all.
Mr. Sullivan: That is all.

The Court: Anything further, Mr. Sullivan?
Mr. Sullivan: Will your Honor pardon me for a minute? [Mr. Sullivan has a short conference with his witnesses.] That is all, your Honor.
The Court: Anything in rebuttal, Mr. Dodge?
Mr. Noble: Will your Honor indulge us a moment?
The Court: We will suspend for five minutes.

[Recess for five minutes.]

Mr. Sullivan: We have a few suggestions as to rulings of law.
Mr. Dodge: With regard to this matter, if your Honor please, I had thought that as there is a good deal of law involved in this
156 case, possibly a written memorandum of law might be filed at some time.
The Court: I shall be glad to receive any such memoranda.
Mr. Dodge: And I would like to suggest that requests for rulings be furnished at that time.
Mr. Sullivan: These were drawn up rather hurriedly, and I would like to furnish mine at the same time that Mr. Dodge furnishes his.
Mr. Dodge: And we have agreed that the stenographer may write out the testimony, so that your Honor may have the report of the testimony.
The Court: Then you do not propose to make oral arguments, but to submit briefs?
Mr. Dodge: I would rather do that.
The Court: Then there will be a reply brief?
Mr. Dodge: Probably not.
The Court: Inasmuch as this is a novel question, it might be helpful to the court to have it covered pretty thoroughly.
Mr. Noble: We will try to cover it in the first instance, but if any question should arise on which we think that we can be of any assistance to the court, we shall be glad to furnish anything additional.
The Court: When will the briefs be filed?
Mr. Dodge: That will depend somewhat on when we get the stenographic record—Two weeks from today?
The Court: Then we will have that understanding?
Mr. Noble: Shall we send them to the clerk here, or to your Honor's residence?
The Court: Send them to the clerk.

[Adjourned.]

157 *Exhibits.*

PLAINTIFF'S EXHIBIT 6.

P. H. Magrane, President. [Electro here.] P. B. Magrane, Treasurer.

New York, Paris, London, Berlin, Belfast, Brussels, Nottingham, Chemnitz.

4409 Oct 16 '14

Magrane Houston Company.

Washington Street and Temple Place.

Cable Address Houshend. Telephone Oxford 2700.

Boston, Mass., Oct. 14, 1914.

The Standard Pattern Co., New York.

GENTLEMEN:

We are led to believe that our agency with the Ladies Home Journal pattern expires within a short time and as we desire to make new connections, will you kindly let us know if you are interested in making a proposition to us and oblige.

Your very truly,

MAGRANE HOUSTON CO.
CHAS. H. WILSON.

CW/J.

Answered Oct. 22 1914 J. T. S.

Scanlon Carroll Route Dept.

October 22nd, 1914.

Magrane Houston Company, Washington Street & Temple Place, Boston, Mass.

GENTLEMEN:

Replying to your Mr. Wilson's letter of October 14th, I write to say, let me hear from you when the termination of your present pattern arrangement is fixed, and, I shall then be pleased to take up the matter with you.

Respectfully,

MA. —— ——.

Plaintiff's Exhibit 7.

Mutual Agreement between the Standard Fashion Company, of New York, first party, and Magrane-Houston Co., of Boston, State of Mass., second party.

158 First party hereby grants to second party an Agency for the sale of Standard Patterns for their store in the City of Boston, State of Mass., for a term of two years from date hereof, and from term to term thereafter until this agreement is terminated, as hereinafter provided, and agrees to sell and deliver f. o. b. New York or at its branch office in Boston, Mass., to second party, Standard Patterns, at a discount of fifty per cent from retail prices, and advertising matter at the prices and on the conditions named on the reverse side hereof; also such other publications as may be issued by first party at regular agents' rates; to allow second party to return discarded patterns semi-annually between January 15th and February 15th, and July 15th and August 15th, in exchange at nine-tenths cost for other patterns to be shipped at the time of return or thereafter; but not in exchange for other goods than patterns. Patterns returned for exchange must have been purchased by second party from first party direct and must be delivered in good order to first party at its general office in New York.

Second party agrees, in consideration of the above, to purchase from first party, for free distribution, Standard Fashion Sheets to a number not less than seventy-five thousand (75,000) per annum, and Handy Catalogues to a number not less than two thousand (2,000) per annum, to pay transportation charges on all goods ordered or returned under this agreement; to purchase and keep on hand at all times, except during the periods of exchange specified above, one thousand ($1,000) dollars' value in Standard Patterns, at net invoice prices, and to pay first party for a pattern stock of the amount stated above, to be selected by the first party, the terms of payment to be as follows: — dollars at time of signing this contract, and five hundred (500) dollars in thirty days after shipment of stock, the balance of the purchase price, five hundred ($500) dollars, to remain unpaid, as a Standing Credit, during the continuance of this agreement, and to become due and payable at its termination, second party to pay interest on this Standing Credit at the rate of 3 per cent per annum on January 15th of each year; all other purchases to be paid for on or before the 15th day of the month succeeding the date of shipment.

159 Second party also agrees not to assign or transfer this agency, nor to remove it from its original location without the written consent of said first party, not to sell or permit to be sold on the premises of second party, during the term of this contract, any other make of patterns, and not to sell Standard Patterns except at label prices. Second party further agrees to permit first party or its representative to take account of pattern stock whenever it desires, to pay proper attention to the sale of Standard Patterns, to conserve the best interests of the agency at all times, to re-order promptly

all patterns as sold, and to give the department a prominent position on the ground floor in the store.

Either party, desirous of terminating this agreement, must give the other party three months' notice in writing, within thirty days after the expiration of any contract period as above specified, the agency to continue regularly during such three months. Upon expiration of such notice, second party agrees to promptly return to first party all Standard Patterns bought under this contract and then on hand, which first party agrees to credit on receipt in good order at three-fourths cost, paying to second party, within thirty days after receipt of same, in cash, any balance due. Neglect to return the pattern stock within two weeks after expiration of three months' notice shall relieve first party from all obligation to redeem the same. Failure to require compliance with the strict letter of this agreement shall not constitute a waiver of any condition nor forfeit nor prejudice any right hereunder.

It is hereby acknowledged by both parties that there are no verbal understandings between them conflicting with this contract.

Dated November 25th, 1914.

STANDARD FASHION COMPANY,
Per ROBERT KELLY,
(*First Party*).
MAGRANE HOUSTON COMPANY,
P. B. MAGRANE, *Treas.*,
(*Second Party*).

Done at Boston, State of Mass.

Contract acknowledged. Ent'd Ag't's List.
Entered L. E. D. 2 New.

160 It is understood between the parties hereto that in the event of the business property of the Magrane Houston Company at Washington Street and Temple Place, or, a substantial part of said property being disposed of by the Magrane Houston Company for business other than dry goods or general department store, the said Magrane Houston Company shall have the privilege of terminating this contract regularly by giving the Standard Fashion Company due notice of such change in the premises aforesaid. Two weeks after the change in the premises shall have been made, the Magrane Houston Company may deliver its stock of Standard Patterns to the Standard Fashion Company for repurchase under the repurchase clause of this contract.

Advertising Matter—Rates and Privileges.

Fashion Sheets: $7.50 per thousand. In lots of 500 and over per month, printed with agent's advertisement (without extra charge) if changed only twice a year. Each additional change $2.00. In lots of 1,000 and over per month, printed with agent's advertisement, which may be changed quarterly (without extra charge). In

lots of 2,000 and over per month, printed with agent's advertisement, which may be changed monthly (without extra charge). Copy of advertisement for March issue must be in our hands by January 15th, to insure insertion. Make same allowance of time on all changes of advertisements. We reserve the right to repeat last advertisement if change is not received by us in due time.

Fashion Sheets: in lots of less than 500 of one issue, without extra printing: 65 cents per hundred; blank space on front page in which merchant may stamp his business card. When 250 or more of one issue are ordered, merchant's card will be printed on front page at a charge of 50c. for each printing.

Handy Catalogues (Issued February and August): $2.00 per hundred, with agent's card printed on first page of cover on orders of 100 or over of one issue, and a part of last page of cover in addition, with same advertisement as running on sheets, when 500 or more are ordered of one issue.

161 PLAINTIFF'S EXHIBIT 8.

Detailed Order.

5001, Jan. 27, '15.

November 25th, 1914.

Standard Fashion Co., New York:

Please ship to us, the goods specified herein, when ready, and charge to our account:

Stock and Tills:

$1,000 Patterns, net value, including Feby, 1915, issue, arranged cabinets
in [tills or packed]* (state which).
Glass Front Drawer Cabinets 1 pr. Ends on Memo.
6 Sections of [Pigeon Holes — holes each, @ $8.00 per 100, if "set up"; $6.00 per 100 if "knock-down."]*

New Monthly Patterns: Beginning with issue for March, 1915:

Class No. 10.

Advertising Matter:

Fashion Sheets.

Beginning with Feb'y Issue.

January	4,000	May	9,000	September ..	6,000
February	4,000	June	8,000	October	10,000
March	4,000	July	4,000	November ...	8,000
April	10,000	August	4,000	December ...	4,000

[*Words and figures enclosed in brackets erased in copy.]

Handy Catalogues.

Beginning with Spring Issue.

Spring Issue 1,000
Autumn Issue 1,000

Spec. order issued 1/28/15.
Entered for Class 10 M F 1/28-15.

Standard Fashion Book: Jan., Feb., March, April, May, June, July, Aug., Sept., Oct., Nov., Dec., 500 each issue.
"The Designer": 25 each month.
Standard Embroideries: 50 each issue.
1/27 15 A. D.

Note:—Unsold copies of "The Designer," Standard Fashion Book and Standard Embroideries are returnable at cost, and orders subject to change.

Large Catalogues, Counter use. 10 each month.
January, February, March, April, May, June,
July, August, September, October, November, December.

Entered Jan. 2 by A. Deutsch.

162 Addressed Postal Card Order Blanks with address, at $1.00 per 100.
[Five Line Rubber Stamp and Pad],* for printing card on blank Sheets and Catalogues, $1.00. (Copy herewith.)
Free Supplies: An assortment of Designer posters monthly. Newspaper Advertising Electros, Numbers, Sales Books, Addressed Envelopes, Order Blanks, Till Numbers, semi-annual Discard Lists and Inventory Blanks.

Signs: Steel Double Sign .$.50 1 Glass Sign $2.00
Brass
3 [Steel Faced]* 39 1 Plate Glass, 38 x 14.... 6.00
inch ..... .75 Plate Glass, 60 x 18.... 15.00

These Signs placed on consignment, at Agent's liability for valuations mentioned.
Usual supply.
Shipping Directions: Stock from New York c/o Boston Office.
Monthly shipment c/o Boston Office.
Small packages by Express. Ship packages over — lbs. by Freight.

(Sign here) MAGRANE HOUSTON COMPANY.
CHAS. H. WILSON.

Street No., Temple Pl. & Washington St.; Town, Boston; State, Mass.

[*Words and figures enclosed in brackets erased in copy.]

PLAINTIFF'S EXHIBIT 9.

[Electro here.]

4437, Mar. 23, '17.

New York, Paris, London, Berlin, Belfast, Brussels, Nottingham, Chemnitz.

Magrane Houston Company,

Washington Street and Temple Place.

Cable Address Houshend. Telephone Oxford 2700.

Boston, Mass., March 21, 1917.

The Standard Fashion Co., 12 Vandam St., New York, N. Y.

GENTLEMEN: Inasmuch as we have been advised you have decided to do business with the R. H. White Co., such information being confirmed by your Mr. Marsh today, we would respectfully ask that you discontinue with us at the earliest possible date.
163 Under our contract with you it is stated we are to give you three months' notice, we prefer, however, to discontinue by the time of the next issue.

A prompt reply will greatly oblige.

Yours very truly,

MAGRANE HOUSTON COMPANY,
By C. A. HANLEY.

CAH/MHM.

P. S. As requested by Mr. Marsh, we are sending a copy of this letter to him.

[Scanlon Francis Allen Pub. Dept. Fink]* Route Dept.
Previously received & acknowledged. J. B.

PLAINTIFF'S EXHIBIT 10.

Chicago, San Francisco, Toronto.

Standard Fashion Company.

Twelve to Sixteen Vandam Street, New York City,
March 23rd, 1917.

Messrs. Magrane Houston Company, Washington Street & Temple Place, Boston, Mass.

GENTLEMEN: We duly received yours of the 21st, requesting an immediate release from contract obligations, because of arrangements we have made selling our goods to the R. H. White Company.

[*Words and figures enclosed in brackets erased in copy.]

We respectfully decline to accede to your request, and in our opinion, there is nothing in the situation which justifies your making it.

As your letter seems to disclose a belief that our agreement with you can be terminated by three months' notice at any time, it is perhaps desirable that we should advise you that such is not the case, and that you — under engagement to handle our goods for the next two years.

Yours very truly,

STANDARD FASHION COMPANY.
J. BREWIS.

JB. RM.

164 PLAINTIFF'S EXHIBIT 11.

[Electro here.]

4324 Apr. 9, '17.

New York, Paris, London, Berlin, Belfast, Brussels, Nottingham, Chemnitz.

Magrane Houston Company.

Washington Street and Temple Place.

Cable Address Houshend. Telephone Beach 2700.

Boston, Mass., April 7, 1917.

The Standard Fashion Co., Van Dam St., New York, N. Y.

GENTLEMEN: The Magrane Houston Co. of Boston, Mass., hereby notify you that they have decided to terminate the sale of your Standard Fashion Patterns in their store in three (3) months from the above date, which is in conformity with the contract entered into between your company and the Magrane Houston Company, dated November 25, 1914.

Very truly yours,

P. B. MAGRANE,
President.

PBM/MHM.

Answered Apr. 11 1917. J. T. S.
[Scanlon Francis Allen Pub. Dept. Fink]* Route Dept.

[*Words and figures enclosed in brackets erased in copy.]

PLAINTIFF'S EXHIBIT 12.

Chicago, San Francisco, Toronto.

Standard Fashion Company,

Twelve to Sixteen Vandam Street, New York City,

April 11th, 1917.

The Magrane Houston Company, Boston, Massachusetts.

GENTLEMEN: We have your Mr. P. B. Magrane's letter of April 7th.

Replying thereto, we beg to refer you to your copy of the contract (if your copy is misplaced we shall be glad to send you another copy) under the conditions of which notice for the termination of the contract between us is not in order at this time.

Very truly yours,

STANDARD FASHION COMPANY.

MA.

165 PLAINTIFF'S EXHIBIT 13.

July 14th, 1617.

Messrs. Magrane Houston Company, Washington Street & Temple Place, Boston, Massachusetts.

GENTLEMEN:

We are in receipt of advice from our Boston representative that you have placed on sale in your store on Washington Street and Temple Place, another make of patterns than Standard Patterns, namely, McCall Patterns manufactured by the McCall Company.

This is in violation of your contract with us, which provides, among other things, that you shall not sell or permit to be sold on said premises any make of patterns other than Standard Patterns.

We hereby demand that you immediately withdraw from sale in said premises any make of paper patterns other than Standard Patterns and that you restore Standard Patterns to sale in said premises, and that you proceed to continue to perform all the conditions of your contract with us for the balance of its term.

Very truly yours,

STANDARD FASHION COMPANY,
J. T. SCANLON,
President.

M. A.

Del'd by Mr. Marsh to Mr. Hanley July 17, 1917—12.15 p. m.

PLAINTIFF'S EXHIBIT 17.

Pattern Agency Agreement.

Town Boston, State Mass., 2/2, 1917.

The McCall Company, New York, N. Y.

As your special agent at Boston Mass. deliver to carrier for us:

(*a*) A stock of McCall Patterns, including when instructions are given within six months from date issue, amounting to $800.00 at 50% of labelled retail prices. Of this amount $250.00 is to be paid by us thirty days after date of shipment; the balance, $550.00 is to remain as a standing credit during the operation of this agreement, upon which standing credit we agree to pay interest at the rate of 4% per annum.

166 (*b*) An average of $60.00 per month of new monthly patterns of your selection at 50% of labelled retail prices, commencing with the month following first stock shipment issue.

(*c*) Publications and supplies as specified on the reverse side hereof.

Discarded Patterns.

Patterns bought from you hereunder and reported by you semi-annually, in January and July, as discarded, may, during the operation of this agreement, be returned by us to your New York office during that January or February and that July or August only, at 100% of regular wholesale prices, in exchange for any patterns which may be shipped to us hereunder after the date of such discard report: In consideration of which we will reorder, weekly or oftener, patterns as sold. Credit bill to be issued to us within thirty days after receipt by you of discarded patterns.

Stock Limit.

A detailed inventory of patterns bought from you and on hand after each discarding, will be sent to you at the time of the return of the discarded patterns. If this inventory exceeds $800.00 at 50% of labelled retail prices, we may return to you patterns in excess of that amount, which patterns shall be credited to our open account at 100% of regular wholesale prices. Should the inventory show our stock of patterns (at 50% of labelled retail prices) to be less than $800.00 you may at once ship and bill to us enough patterns to restore the stock to that amount.

We will not assign this agency, nor move the same to other premises without your written consent.

All goods bought, except the original stock of patterns, will be paid for on or before the fifth of the month succeeding date of shipment.

All prices quoted are net, and we will pay transportation charges on all goods received from you or returned by us.

This agreement is to remain in force from date of approval and three acceptance at New York, N. Y., and for [five]* years after date of first shipment, and thereafter until the expiration of a three months' written notice given by either party to the other, and the
167 standing credit may be liquidated by the delivery to your New York office, within thirty days after the expiration and fulfillment of this agreement, of a sufficient quantity of patterns, in a reasonably good salable condition, bought hereunder, which shall be credited at 100% of the regular wholesale prices.

Agent's Signature: MAGRANE HOUSTON CO.,
By P. B. MAGRANE,
Treasurer.
THE McCALL COMPANY,
By FRANK J. PIERSON.

Approved and accepted, New York, N. Y., 19—.
THE McCALL COMPANY,
(Incorporated State of New York,)
By F. S.

Specifications for Publications and Supplies.

Fashion Sheets, beginning with the — issue, as follows:

January, 7,000; February, 7,000; March, 10,000; April, 10,000; May, 9,000; June, 7,000; July, 7,000; August, 7,000; September, 9,000; October, 10,000; November, 9,000; December, 7,000.

Price, $7.50 per thousand, including our name and address on the front cover and an advertisement of approximately one-half of the back cover (which may be changed 6 times each year) without additional charge.

The following publications are not returnable, but the quantities are subject to revision by reasonable notice.

Ready Reference Catalogue (March and September) 1,000 copies, each issue, at $1.00 per hundred net.

In lots of 500 or more copies of the Ready Reference Catalogue, our display advertisement is to be printed on the outside front cover page without charge. The copy may be changed with each issue.

Copy, for display advertisements for any publications which may carry our advertisements, is to be furnished you on or before the fifth of the second month preceding the dated month of publication for which such copy is intended. The McCall Company may re-
168 fuse to print any advertisements which are for any reason considered unsuitable for publication.

The McCall Complete Catalogue (Monthly), 10 copies, each issue, at 10c. per copy. (For counter use.)

McCall Book of Fashions (Quarterly):

[*Words and figures enclosed in brackets erased in copy.]

Spring 500 copies, Summer 500 copies, Autumn 500 copies, Winter 500 copies, at 60% of retail price (each copy to contain a coupon good for any 15c. McCall Pattern free, redeemable by The McCall Company).

McCall's Embroidery and Needlework Book, 10 copies per month, at 60% of retail price (each copy to contain a coupon good for any 10c. McCall Kaumagraph Pattern free, redeemable by The McCall Company).

McCall's Magazine (Monthly), 30 copies, each issue, at 60% of retail price.

Pigeonhole Cases (finished oak or mahogany), — sections, containing — tills per section, at 6c. per till. — bases, no charge.

Drawer Cabinets (finished oak or mahogany) — sections of — (15 or 18) drawers per section at $1.00 per drawer, — ends, at $3.50 per pair.

Counter Book Covers at 75c. each.

Signs (loaned) as follows:

Sales Books, Magazine Subscription Books, Colored Plates and Show Cards to be furnished without charge.

169 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Magrane Houston Company, a corporation organized under the laws of the State of Massachusetts and a citizen and resident of said State, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twenty-seventh day of March next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein The Standard Fashion Company, a corporation duly organized under the laws of the State of New York and a citizen and resident of said State, is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles F. Johnson, Circuit Judge, duly assigned to hold the District Court of the United States for the District of Massachusetts, this thirteenth day of March in the year of Our Lord one thousand nine hundred and eighteen.

CHARLES F. JOHNSON,
United States Circuit Judge.

Acknowledgment of Service on Citation on Appeal.

Due service of the within citation on the Magrane Houston Company is hereby acknowledged.

JAMES W. SULLIVAN,
Attorney for Magrane Houston Company.

170 *Clerk's Certificate.*

UNITED STATES OF AMERICA:
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States, within and for the District of Massachusetts, certify that the foregoing is a true copy of the record and all proceedings in the cause in equity, entitled No. 815. The Standard Fashion Company, Plaintiff, v. Magrane Houston Company, Defendant, in said District Court determined, the Opinion of the Court, dated March 9, 1918. Plaintiff's Petition for Appeal. Plaintiff's Assignment of Errors. Stipulation as to Use of Exhibits, Stipulation as to Record. Præcipe, and also the original Citation issued upon the appeal of the plaintiff, with Acknowledgment of Service thereon.

In testimony whereof, I hereto set my hand and affix the seal of said District Court, at Boston, in said district, this twenty-first day of March, A. D. 1918.

[SEAL.] JAMES S. ALLEN,
Clerk.

171 United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1343.

THE STANDARD FASHION COMPANY, Plaintiff, Appellant,

v.

MAGRANE HOUSTON COMPANY, Defendant, Appellee.

Appeal from the District Court of the United States for the District of Massachusetts.

Before Dodge, Bingham and Brown, JJ.

Opinion of the Court.

June 28, 1918.

PER CURIAM:

The plaintiff fails to satisfy us that the negative covenant in its contract with the defendant is one which the court should enforce by injunction, even if it is not in violation of the Clayton Act. We do not think it sufficiently proved that the plaintiff will sustain any substantial injury from the breach of that covenant beyond that for which it can recover damages in a suit at law.

While the covenant forbids the defendant "to sell or permit to be sold" on its premises, patterns other than the plaintiff's, it does not prevent defendant from selling elsewhere, and the plaintiff is

left free to establish other agencies for their sale, wherever it may be able to do so; and it had in fact, while the contract was in force, established another agency with a concern larger than the defendant, doing business in the defendant's immediate vicinity. That
172 the loss of the defendant's agency during the unexpired term of the contract damages the plaintiff, under these circumstances, to an amount not calculable in money, we are not prepared to believe upon the testimony of the plaintiff's president, which is all that is offered to support the claim.

The circumstances under which like negative covenants were enforced by injunction in Butterick, etc., Co. v. Fisher, 203 Mass. 122, or in those cases in other State courts upon which the plaintiff relies, were, in this and other material respects, different from those presented in this case. The decisions referred to are not in any event binding upon us. The negative covenant here in question being in its nature auxiliary to the performance of agreements which we cannot order specifically performed, is therefore not to be enforced by injunction unless such relief is shown clearly necessary to prevent substantial injustice, in the absence of any adequate remedy at law.

In Javierre v. Central Altagracia, 217 U. S. 502, the issue of an injunction to enforce a negative covenant of this character was disapproved. It was said (p. 508) that "There is a certain anomaly in granting the half way relief of an injunction" against the breach of such a covenant "when the court is not prepared to enforce the performance to accomplish which indirectly is the only object of the negative decree."

In Dalzell v. Dueber Mfg. Co., 149 U. S. 315, the court said, applying the language of Colson v. Thompson, 2 Wheat., 336, 341,—

"The contract which is sought to be specifically executed ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy."

We do not think it can be said that the contract here in question is so clear in its terms that neither party could reasonably misunderstand them. The negative covenant is as follows:

173 "Second party also agrees * * * not to sell or permit to be sold on the premises of second party, during the term of this contract, any other make of patterns and not to sell Standard Patterns except at label prices."

It is necessary to determine the meaning of the phrase, "the term of this contract." The defined term is "a term of two years from date hereof," November 25, 1914. The following words, "from term to term thereafter until this agreement is terminated as hereinafter provided," do not explicitly define the duration of any term. The negative covenant may well be limited to the defined term of two years. Upon the plaintiff's construction we should be obliged to enlarge the language of the covenant and to read it, "during the continu-

ance of this contract," thereby including any subsequent or additional terms which might result from any failure to give notice of a desire to terminate. We do not find a clear intention of the defendant to be bound by the negative covenant for an indefinite period, or for further terms each of two years and three months. That the defendant was willing to restrict the use of its premises during a defined term of two years or of two years and three months, does not indicate a willingness to be restricted indefinitely or throughout any future period of contract relations. We see no reason why the contract relations might not well continue between the parties after the restriction upon defendant's use of its premises had ceased at the end of two years. It is in evidence that there are many contracts of this character which are in successful operation without the aid of a negative covenant like this.

Furthermore, we think the terms of the contract relating to notice of desire to terminate are not so precise that neither party could misunderstand them. They provide for notice within thirty days "after the expiration of any contract period." The meaning of the words "any contract period" is not clear. The plaintiff contends that it is a term of two years from date, but owing to the peculiarity of the provision that notice of a desire to terminate must be given within thirty days after the expiration of any contract period, it results that the minimum period for which the parties were bound upon execution of the contract is a period of two years and at least three months
174 and one day; not a period of two years, which is the ostensible "term" of the contract.

Ordinarily a provision for notice of termination is required to be given within the defined contract period and is not employed for the purpose of extending the original period of obligation. The present contract is unusual in this respect. As a result, the words "any contract period" may refer either to the defined term of two years, or to the additional period of not less than three months and one day, or to the combined periods of two years and three months and one day.

Within thirty days after the expiration of this combined period of two years and three months, the defendant, by its letter of March 21, 1917, though somewhat informally, gave notice of its desire to terminate. The letter, it is true, stated a preference to discontinue in less than three months. Nevertheless it requested discontinuance at the earliest possible date, which fairly means at least at the end of the period of three months to which the letter refers. The plaintiff's letter in reply expressly refused to recognize, but, on the contrary, denied the defendant's right to terminate at three months' notice, and asserted that the defendant was under engagement for the next two years. It thus appears that whatever be the true construction of this unusual and somewhat complicated contract, its terms are not so precise that neither party could resonably misunderstand them.

Upon the question of the application of the Clayton Act we express no opinion.

We affirm the judgment of the District Court, not for the reasons assigned in its opinion, but on the ground that the negative covenant, if valid and not prohibited by the Clayton Act, does not justify the

interposition of the extraordinary powers of a court of equity to grant the special relief sought.

The decree of the District Court is affirmed, reserving the right of the appellant to make application to that court under Equity Rule 22 to transfer its suit to the law side of that court; and the appellee recovers costs in this court.

175 United States Circuit Court of Appeals for the First Circuit.

THE STANDARD FASHION COMPANY, Plaintiff-Appellant,

v.

MAGRANE-HOUSTON COMPANY, Defendant-Appellee.

Petition for Rehearing.

Now comes The Standard Fashion Company, plaintiff-appellant, and respectfully petitions this court for a rehearing of the above-entitled appeal because of alleged errors in the opinion of the court.

I.

This court decided the appeal upon grounds not argued by either party nor suggested in any way by the opinion of the court below. Neither in the arguments of counsel nor in the opinion of Judge Johnson was it suggested that the damages for breach of the contract could be adequately computed nor that there was ambiguity in the contract with respect to its term or anything else. The Clayton Act furnished the only ground of defense relied on by the defendant. What the plaintiff now asks is in reality not a rehearing but an original hearing upon the matters dealt with in the opinion of this court.

176 II.

This court seems to have based its decision principally upon the conclusion that there is ambiguity in the contract with respect to its term and particularly with respect to the duration of the negative covenant. The defendant has not contended that there was such ambiguity. The trial court apparently found no such ambiguity. It found unhesitatingly that the contract had not been terminated (Record, p. 13) and that it continued in force with respect to the negative covenant as well as the rest of its provisions "unless it can be successfully attacked" under the Clayton Act. This finding has never been challenged in any way by the defendant. On the contrary, the fact that the contract, if not obnoxious to the Clayton Act, was still in existence was assumed by both parties in their briefs and arguments in this court. If, contrary to this assumption of counsel, the case is now to be decided upon the ground suggested by this court, the plaintiff feels that it should have at least one opportunity of submitting an argument upon the point.

III.

The fact that the plaintiff established an agency with the R. H. White Co. while the contract between the plaintiff and the defendant was in force does not warrant the denial to the plaintiff of equitable relief.

Not only was the establishment of such an agency entirely consistent with the plaintiff's contract with the defendant, but it involved no conduct on the part of the plaintiff that was inequitable in any sense. Indeed, at the very time when the contract between the plaintiff and the defendant was made and for some time thereafter, the plaintiff had two other agencies in the retail district of Boston, one much nearer the defendant's store than is that of the R. H. White Co. (pp. 36-7).

The plaintiff was entitled to the profits on such business as it could secure through the agency at the R. H. White Co. in addition
177 to such profits as it could secure through the sale of its patterns in the defendant's store, and neither in a court of law nor in a court of equity can the defendant complain of the opening of the agency in the other store. The suggestion of the defendant (Ex. 9, p. 162) that its desire to terminate its contract with the plaintiff was the result of the agency contract made by the latter with the White Co. is shown by the evidence to be only a subterfuge, as the defendant made its contract with the McCall Co. before the plaintiff made its contract with the White Co. (See plaintiff's brief, pp. 4-5.)

The White contract was furthermore made after the defendant had failed to give notice of a desire to terminate its contract with the plaintiff within thirty days after the expiration of the first two year period. In reliance upon the fact that the latter contract would continue for a further period of two years, the plaintiff inserted in the White contract a provision binding it not to establish an agency other than with the defendant within one-half mile of the White store. (Record, pp. 50, 51.) This provision precludes plaintiff from obtaining any other agency in the Boston dry goods district to replace that in the defendant's store. For this reason, the White contract should form a basis for equitable relief instead of a reason for denying such relief.

This court appears to treat the establishment of the White agency as impairing the plaintiff's right to equitable relief on the ground that in some way it affects the plaintiff's contention that it is damaged "to an amount not calculable in money." It is impossible to see how the existence of the agency with the R. H. White Co., whether it affects the amount of the damages or not, can render it easier to calculate that amount in dollars and cents or render the plaintiff's remedy at law in any respect more certain, complete, and adequate. The damages sought by the plaintiff for breach of the negative covenant and the consequent diversion of business to a competitor cannot possibly be determined in dollars and cents. Even if the damage suffered by the plaintiff because the defendant ceased to handle its patterns could be found to be diminished at all

by the existence of the White agency, the existence of that
178 agency cannot possibly affect the amount of damage which results from the defendant's further act of establishing in its store an agency of a competitor of the plaintiff. In no event can the existence of the White agency make the plaintiff's damages for breach of the negative covenant more susceptible of computation.

In its opinion the court after calling attention to the establishment of the agency with the R. H. White Co. says:—

"That the loss of the defendant's agency during the unexpired term of the contract damages the plaintiff, under these circumstances, to an amount not calculable in money, we are not prepared to believe" * * *

How can it possibly be claimed that the circumstances stated have any bearing upon the ability to compute in dollars and cents the damages, not for the loss of the agency, but for the breach of the negative covenant and the establishment of a competing agency with its consequent diversion of trade? If the defendant had discontinued its relations with the plaintiff without installing a rival pattern, the only element of damage would have been the loss of the agency and this is the only element of damage to which the court in the passage above quoted referred. The defendant, however, went beyond this and obviously inflicted further damage upon the plaintiff by establishing an agency for the McCall patterns. The additional damage resulting from this, which this court apparently has not considered at all, is naturally not susceptible of computation. All of the evidence introduced by the plaintiff on the question of damages related to the damages which it suffered from the loss of the agency. None of it related in any way to the damage resulting from the breach of the negative covenant. Even with reference to its damages for loss of the agency, the plaintiff necessarily could not go beyond evidence of the profit which it might have made in the defendant's store. There was obviously no way of showing its loss on such sales, outside of the defendant's store, as would have been induced by the distribution of 75,000 Standard Fashion Sheets per year by the defendant to persons who purchased their patterns elsewhere.

179 IV.

That damage of this sort cannot be shown in dollars and cents had been recognized by all of the courts before which the question has come as a reason for granting equitable relief. No court has ever held that damages from breach of such a covenant can be computed. While the Massachusetts case of Butterick Publishing Co. v. Fisher and the similar cases in other state courts are of course not "binding" upon this court, they were referred to as being decisions of some of the most highly esteemed state courts in the country and as being not only persuasive in their reasoning but in accordance with the uniform current of authority in the federal as well as in the state courts. If there are any differences, as suggested by this court, between these decisions of the state courts and the present case, the

differences are entirely immaterial so far as concerns the possibility of computing the damages from the breach of the negative covenant. The fact that in those cases the agency had not been actually opened means merely that the damages were much less than in the present case, for here after the agency had continued in existence for more than two years a trade had necessarily been built up among the defendant's customers which was of value to the plaintiff and which the defendant certainly should not be allowed to divert to a competitor of the plaintiff.

In the Massachusetts case the court treats the lack of adequacy of the remedy at law for breach of the negative covenant as being obvious. Loring, J., said (203 Mass., at p. 131):—

"The defendant's covenant not to sell or permit to be sold on his premises any other make of patterns is a covenant where the thing contracted for cannot be purchased by the plaintiff, and where damages are not an adequate compensation."

In Standard Fashion Co. v. Siegel Cooper Co., 30 App. Div. 564; aff'd in 157 New York 60, Judge Morgan J. O'Brien, speaking for the Appellate Division, said in language expressly approved by the Court of Appeals: —

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"It cannot be doubted that Courts are instituted to enforce rights, to redress injuries and to restrain contemplated wrongs, and it is difficult to see any sound reason which should prevent a Court from granting any relief, because it cannot give all the relief to which the party may be entitled. We think that no sound principle is violated in holding that the Court should extend its relief as far as it is able, and where it cannot, as in this case, enforce the specific performance of the affirmative covenants by compelling the defendant to carry out its contract, it has the power, and it should exercise it, to prevent the defendant, the Siegel Cooper Company, from obtaining an advantage from a breach of its agreement, and inflicting a double wrong, first, in depriving plaintiff of the right to sell, and, secondly, by conferring such rights on a business competitor."

In affirming the order of the court below the New York Court of Appeals based its decision in large part upon the authority of the federal cases concerning negative covenants, including some of those cited on page 14 of the plaintiff's brief in this case, and also certain others (157 New York, at p. 67).

The rule that an injunction may issue to restrain the breach of a negative covenant, though specific performance of the affirmative covenants cannot be decreed, is nowhere better settled than in the federal courts. It happens that perhaps the leading decision is that of Judge Lowell of this Circuit in Singer Machine Co. v. Union Buttonhole Co., Fed. Cas. No. 12,904 (C. C. Mass.), a case which has been cited and followed over and over again.

In addition to the cases cited on page 14 of the plaintiff's brief see Chicago & A. Ry. Co. v. N. Y. L. E. & W. R. Co. 24 Fed. 516 (C. C. S. D. N. Y.), and also the very late case of Automobile Ins. Co. v. Guaranty Securities Corporation, 240 Fed. 222 (D. C. S. D. N. Y.)

in which the decision in Standard Fashion Co. v. Siegel Cooper Co., 157 N. Y. 60, is discussed and approved.

The negative covenant in the contract in question is not, it
181 is respectfully submitted, "auxiliary" to the performance of "the other covenants of the contract," as stated by this court in its opinion, but creates an additional and distinct obligation the breach of which, concurrently with the breach of the affirmative covenants, leads to the infliction of what Judge O'Brien calls in the passage above quoted "a double wrong upon the plaintiff." It is the breach of the negative covenant that makes the wrong a double one. For this branch of the wrong equitable relief is clearly necessary to prevent substantial injustice.

It is further submitted, with respect, that this court has overlooked a principle recently reaffirmed by the Supreme Court of the United States. In the very late case of Union Pacific R. R. Co. v. Board of Commissioners of Weld County, 38 Sup. Ct. Rep. 510, decided June 3, 1918, the court held that where the remedy at law is doubtful, a court of equity will not decline cognizance of a suit on account of the existence of a legal remedy, quoting and reaffirming the following passage from the opinion in Davis v. Wakelee, 156 U. S. 680, 688:

"It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. * * * Where equity can give relief, the plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law."

It may not be amiss to remind the court that the defendant by its answer admits the allegations of paragraph 8 of the bill of complaint to the effect that the defendant has not only sold on its premises the patterns of the McCall Co., but that it

"has not paid proper attention to the sale of Standard patterns, but, on the contrary, has paid attention to the sale of said McCall patterns, and the defendant has not conserved the best interests of the agency for Standard patterns, but, on the contrary, has conserved the best interests of the McCall Co., plaintiff's competitor, by the sale of said McCall patterns and by the distribution of large quantities
of McCall Fashion Sheets and has diverted the trade of plain-
182 tiff's patterns among the defendant's customers to the said McCall Co."

and

"unless restrained by order of this court the defendant intends to continue the sale of said McCall patterns and to continue the aforesaid breach of said contract."

V.

The decisions of the Supreme Court of the United States referred to on page 2 of the opinion of this court seem to have but a very remote bearing upon the issues presented upon this record.

In Javierre v. Central Altagracia, 217 U. S. 502, in which this court says that

"the issue of an injunction to enforce a negative covenant of this character was disapproved,"

it appears upon an examination of the report of the case that there was no negative covenant in the contract. It appears, on the contrary, that the defendant had merely contracted to sell and deliver to the plaintiff all his sugar-cane for a certain period. It was a contract of which specific performance would not be decreed, and the court objected to what it termed "the half-way relief of an injunction" restraining the defendant from delivering sugar-cane to some one other than the plaintiff.

The existence of the negative covenant is the crucial element in cases of this character. If it is present the injunction will be granted. If it is absent, it will be denied, as in Butterick Publishing Co. v. Boynton, 191 Mass. 175, which differed from the Fisher case only in the absence of the negative covenant.

In Dalzell v. Dueber Watch Case Mfg. Co., 149 U. S. 315, it was merely held that specific performance of an alleged oral contract would not be decreed without clear and satisfactory proof of the making of the contract set forth in the bill.

So in Coulson v. Thompson, 2 Wheat. 335, the alleged
183 contract was oral, and the court held that the plaintiff had not sufficiently proved that it was ever made. The opinion concludes with this statement:

"Thus it appears that the complainant has failed not only to prove the contract stated in the bill, but also his performance of those acts which form the consideration of the alleged promise on the part of the defendant."

It is submitted that these cases are not authority, and that there is no authority, for the proposition that a written contract, admitted to have been duly executed by the parties, will not be enforced in equity merely because its language might be conceivably capable of different constructions; and with especial confidence it is submitted that there is no principle which should lead a court, in order to decline taking jurisdiction in equity, to search a contract for ambiguities which never occurred to either party to the contract and are not asserted by either party to exist.

VI.

In the present case the court finds that in two particulars the contract is not "so clear in its terms that neither party could reasonably misunderstand them." It is submitted in the first place that this cannot be of any consequence except in a case where one of the parties comes into court and says that he has misunderstood the terms of the contract, and secondly that in the present case there is no ambiguity.

The first point made by the court is that the phrase "during the

term of this contract," in the negative covenant, is ambiguous, as the term is not explicitly defined and it might be contended that the negative covenant was to apply only during the initial period of two years or of two years and three months. The defendant makes no such contention. As to this the plaintiff contends in the first place that it would be very unusual if a contract which by its terms is to continue for an indefinite period unless terminated by one of
184 the parties at stated times should be held as to one of its obligations to terminate necessarily at a certain fixed date, leaving all the rest of the obligations in effect throughout the term of the contract.

See Great Northern Ry. Co. v. Manchester, etc., Ry. Co., 5 De G. & S., 138, 147.

Surely any one who contends that a particular clause in a contract, subject to periodical renewal in the absence of a notice to terminate, drops out of the contract at the time of the first renewal, must have the burden of showing that the contract so reads. It is obvious that if the negative covenant had been intended to continue only two years, it would have been so expressed in the contract.

Neither party to this contract for one moment believed, or now claims to have believed, that the negative covenant was not to survive during the entire life of the contract, however long that might be.

It is respectfully submitted that there is no more real ambiguity with respect to the other clause commented on by the court. The contract provides that it shall continue "for a term of two years from the date hereof, and from term to term thereafter until this agreement is terminated, as hereinafter provided." There is no further reference to the term or duration of the contract until the provision is reached concerning the right to terminate it. That provision is as follows:

"Either party, desirous of terminating this agreement, must give the other party three months' notice in writing within thirty days after the expiration of any contract period as above specified, the agency to continue regularly during such three months."

The sole question would appear to be, what is meant by the words "any contract period as above specified." There can be but one answer: Any contract period is any term of two years, either the original term or a later one. There is no other period "above specified" anywhere in the contract.

The words quoted in the opinion of this court are only a
185 part of the clause as it reads in the contract. The words "after the expiration of any contract period" might perhaps have a different meaning from the words "after the expiration of any contract period as above specified." The court appears to overlook these last words, as well as the correlative provision at the beginning of the contract to the effect that it shall continue "for a term of two years * * * and from term to term thereafter until this agreement is terminated, as hereinafter provided."

It may be noted that there is no reference in the contract to three

months except in the very sentence which refers to "any contract period as above specified." It cannot possibly be contended that any such term as two years and three months is "above specified."

The contract provides that the agency shall "continue regularly" for three months after the notice of termination is given. The notice of termination cannot be given until after "the expiration of any contract period." Since these three months must come after the "expiration of any contract period," they cannot be properly construed as forming part of any such contract period. This Court, therefore, we respectfully submit, is in error in finding (Opinion, p. 4) that the words "any contract period" "may refer * * * to the additional period of not less than three months and one day, or to the combined periods of two years and three months and one day."

The plaintiff contends that these provisions of the contract are perfectly clear on their face and are reasonably susceptible of only on construction, namely, that the term of the contract is for successive periods of two years each, subject to the right of either party to terminate it upon proper notice given within thirty days after the expiration of any two-year period. The contract was so construed by the plaintiff. The defendant has not argued that the construction is not proper. It was so construed by Judge Johnson. It is presumably so construed by this court, which has reserved to the appellant the right to make application for the transfer of the suit to the law side of the court, obviously on the theory that the contract had not been properly terminated.

186 It may be added that the defendant never made any such contention as is now suggested by the court. Its letter of March 21, 1917, which happened to be sent within thirty days after the expiration of two years and three months from the date of the contract, was not intended as a notice of termination. The formal notice, which was sent on April 7, 1917, and which is relied upon in the answer (Record, p. 9) and also in the defendant's brief filed in this court (p. 2) as being notice under the contract, was sent more than thirty days after the expiration of the two years and three months. With respect to this point the position taken by the defendant, in its answer, was that the contract "should be constued as binding the defendant for two years and from time to time thereafter until notice of its termination was given" (p. 10), so that the notice might be given at any time after the expiration of two years. This point was so obviously without merit that it appears to have been abandoned by the defendant after the filing of its answer as there is no suggestion of it in the brief filed in this court. Indeed, there is no suggestion anywhere in that brief that either of the alleged ambiguities pointed out by this court ever occurred to the defendant.

Wherefore the plaintiff petitions for a rehearing of the appeal.

STANDARD FASHION COMPANY,
By HERBERT NOBLE,
JAMES B. SHEEHAN,
ROBERT G. DODGE,
Its Attorneys.

I, Robert G. Dodge, of counsel for the appellant, certify that I have examined the foregoing petition and that in my opinion the said petition is well founded and meritorious, and is entitled to the consideration of the court.

ROBERT G. DODGE.

187 United States Circuit Court of Appeals for the First Circuit, October Term, 1918.

No. 1343.

THE STANDARD FASHION COMPANY, Plaintiff, Appellant,

v.

MAGRANE HOUSTON COMPANY, Defendant, Appellee.

Appeal from the District Court of the United States for the District of Massachusetts.

Before Bingham, Anderson and Brown, JJ.

Opinion of the Court.

June 28, 1919.

ANDERSON, *J.:*

After the per curiam opinion of June 28, 1918, the plaintiff petitioned for a rehearing. The petition was granted. The plaintiff has orally and on brief elaborately re-argued the case. On careful reconsideration we are constrained to adopt the construction of the contract urged by the plaintiff and made by the court below.

Construing the contract as a whole, we do not think it can fairly be held so ambiguous as, if valid in all its provisions, to warrant the court in refusing the injunction prayed for.

The contract runs for a term of two years from date and "from term to term thereafter until this agreement is terminated as hereinafter provided." The provision for termination is:

"Either party desirous of terminating this agreement must give the other party three months' notice in writing within thirty
188 days after the expiration of any contract period as above specified, the agency to continue regularly during such three months."

The contract is dated November 25, 1914. Its first two-year term ran to November 25, 1916; failing the three months' notice within thirty days thereafter, the contract then ran until November 25, 1918. Then for thirty days there was another opportunity to give the three months' written notice of termination. And so on from term to term.

We think the negative covenant (assuming for the moment it and the rest of the contract to be valid) is applicable to the entire life of the contract construed as to duration as we have indicated; that the contract shows a clear intention of the defendant to be

bound for successive terms of two years, and for three months after notice of termination. We adopt, therefore, the construction put upon the contract by the court below.

We also agree with the District Court that the contract does not establish an agency "properly so termed," but that it is a contract for sale. The case is easily distinguishable in this regard from Willcox & Gibbs Co. v. Ewing, 141 U. S. 627. Full title passed from the plaintiff to the defendant. The defendant was selling its own goods to its own customers; it was not, under delegated authority, selling plaintiff's goods to the plaintiff's customers.

See the cases collected and to some degree discussed in

Ford Motor Company v. Union Motor Sales Co., 244 Fed. 156,

and

Ford Motor Company v. Benjamin E. Boone, Inc., 244 Fed. 335.

Cf. Mechem on Agency, Sec. 44-48, and cases cited;
Mechem on Sales, Sec. 41 et seq.;
2 Corpus Juris, pp. 442, 423.
John H. Pray & Sons Co. v. Appledore L. & Bldg. Co., 76 N. H. 167.
Bendix v. Staveo Corridge Co., 174 Ill. App. 589, 595.

An agency is not created simply by calling a contract for sales an agency contract.

We may test the question whether the defendant was the
189 plaintiff's agent engaged in selling the plaintiff's goods, or a vendee selling its own goods, by querying whether the plaintiff could be held liable in tort for the defendant's material and false misrepresentations made to a customer,—such misrepresentations, for instance, as that patterns sold embodied the latest Paris fashion when in fact they were obsolete. Obviously, if the defendant was the plaintiff's agent, its misrepresentations, made in the course of the business of the agency, would bind the plaintiff. We think the plaintiff would be surprised to find this or any other court holding it responsible for such tortious conduct of the defendant with relation to the sale of these patterns.

The plaintiff admits that the notice of termination given by the defendant on April 7, 1917, followed by this suit brought on July 25, 1917, must be deemed applicable to the term of the contract expiring on November 25, 1918, as though given within thirty days after November 25, 1918. The plaintiff consequently admits that its right to an injunction expired on February 25, 1919.

But the plaintiff insists that the fact that relief by injunction has now become inappropriate by reason of lapse of time does not warrant the court in refusing to retain jurisdiction in equity for the purpose of granting any appropriate relief, though it be only for the assessment of damages.

Clark v. Wooster, 119 U. S. 322;
Busch v. Jones, 184 U. S. 598;
Cartwright v. So. Pacific, 206 Fed. 234;
Beedle v. Bennett, 122 U. S. 71;
County of Mobile v. Kimball, 102 U. S. 691.

Assuming for the moment that the contract and all the stipulations thereof are valid, the great weight of authority is in favor of the plaintiff's proposition that it was entitled to an injunction against a breach of the negative covenant.

Butterick Publishing Co. v. Fisher, 203 Mass. 122;
Standard Fashion Co. v. Siegel-Cooper Co., 30 App. Div. 564; 157 New York, 60;
Butterick Publishing Co. v. Chabot, N. Y. Law Journal, July 21, 1908; affirmed 128 App. Div. 900;
190 Butterick Publishing Co. v. Rose, 141 Wis. 533;
Peerless Pattern Co. v. Gauntlett Dry Goods Co., 171 Mich. 158.

We think, therefore, that the plaintiff's contention that it is now entitled to a decision from this court either affirming or reversing the decision of the District Court must prevail. The plaintiff insists, and rightly, that the gist of the case is whether the Clayton Act invalidates its contract in whole or any part, and that the fact that its right to an injunction has expired pendente lite, does not relieve the court from the duty of determining the issues admittedly alive and involving substantial rights at the time of the argument of the appeal in this court.

Does Section 3 of the Clayton Act invalidate the negative covenant in this contract? We think it does and that the decision of the District Court in that regard must be affirmed.

The mere fact that Congress enacted the Clayton Act after numerous courts had held similar or analogous restrictions not obnoxious to the Sherman Act, or invalid at common law, or under State anti-trust statutes, grounds an inference that the legislature intended, in the light of actual experience, to change the law.

Butterick Pub. Co. v. Fisher, 203 Mass. 122.
Brown v. Rounsavell, 78 Ill. 589;
Southern Fire Brick & Clay Co. v. Garden City Sand Co., 223 Ill. 616;
Heimbuecher v. Goff, Horner & Co., 119 Ill. App. 373;
Ferris v. American Brewing Co., 155 Ind. 539;
J. W. Ripy & Son v. Art Wall Paper Mills, 41 Oklahoma, 20;
In re Greene, 52 Fed. 104;
Mogul Steamship Co. v. McGregor, 1892 A. C. 25;
Whitwell v. Continental Tobacco Co., 125 Fed. 454;
Peerless Pattern Co. v. Gauntlett Dry Goods Co., 171 Mich. 158;
Sullivan v. Rime, 35 S. Dak. 75;
Standard Fashion Co. v. Siegel-Cooper Co., 30 App. Div. 564; 157 New York, 60;
191 Butterick Publishing Co. v. Chabot, N. Y. Law Journal, July 21, 1908; affirmed 128 App. Div. 900;
Butterick Publishing Co. v. Rose, 141 Wis. 533.

There is no answer to the suggestion of Judge Trieber in U. S. v. United Shoe Machinery Co., 234 Fed. 127, 150, that the "presump-

tion is, not that Congress intended that the construction of the Sherman Act should control, but on the contrary that it should not control." And again quoting from Judge Trieber: "Evidently Congress was not satisfied to only prohibit actual lessening of competition, or monopolizing, but to make it unlawful for any person to do these acts, which may put it in his power to do so."

The very title of this act is significant—"An Act to supplement existing laws against unlawful restrictions and monopolies and for other purposes."

In the report of the Senate Committee on Judiciary upon this bill is the following statement of the legislative purpose:—

"Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890, or other existing anti-trust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation. Among other of these trade practices which are denounced and made unlawful may be mentioned discrimination in prices for the purpose of wrongfully injuring or destroying the business of competitors; exclusive and tying contracts; holding companies; and interlocking directorates."

In the report of the House Committee there is also instructive language concerning section 3:—

"Let us therefore consider what this section really accomplishes. It prohibits the exclusive or 'tying' contract made between the manufacturer and the dealer by purchase or lease, whereby the latter agrees, as a condition of his contract, not to use or deal in the commodities of the competitor or rival of the seller or lessor. It is designed merely to prevent this unfair trade practice now so common throughout the country, and which is generally regarded by everyone who has given the subject any serious consideration as unjust to the local dealer and to the community and as monopolistic in its effects."

192 "What is the motive and purpose of the manufacturer in making or entering into such exclusive contract? It is undoubtedly his purpose to drive out competition and to establish a monopoly in the sale of his commodities in that particular community or locality. His contract by its express terms completely shuts out competition in the business of the local dealer with whom he makes it. The dealer bound by this exclusive contract not to handle the goods, wares, and merchandise of another becomes the ally of the manufacturer in his effort and purpose to drive out competition in the locality or community in which such commodities are sold. This is done by means of extensive advertising, and let it be borne in mind also that this advertising is added in the price of the commodities and paid for by the consumer. If by the combined efforts of the manufacturer and the local dealer and the glowing and overdrawn and oftentimes false advertisements competitors are com-

pelled to retire from the field, a monopoly in the particular community or locality is the invariable result. In this connection it is important to state that today in every village and locality where there is only a single store and this exclusive or 'tying' contract is entered into between the manufacturer and the local dealer concerning any commodity, the exclusive or 'tying' contract gives both the manufacturer and the local dealer a complete monopoly of that particular commodity in the locality or community. That the effect of such a system is detrimental to the consumers and to the general public cannot be questioned for a moment.

"The public is compelled to pay a higher price and local customers are put to the inconvenience of securing many commodities in their communities or through mail-order houses that cannot be procured at their local stores. The price is raised as an inducement. This is the local effect. Where the concern making these contracts is already great and powerful, * * * the exclusive or 'tying' contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors, not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful combinations are operating under this system and practice. * * * When we consider contracts of sales made under this system, the result to the consumer, the general public, and the local dealer and his business is even worse than under the lease system."

193 For present purposes, the fact that this section was amended in conference before final enactment we regard as of little or no significance. The reports of the two committees illuminate the evils and dangers in the trade situation with which Congress was undertaking to deal. As frequently happens, debate and conference modified the legislators' views as to the best method of dealing with the evils aimed at. But we find no abandonment of the main purpose expressed in these committee reports. Restrictions of this sort that may substantially lessen competition or tend to create a monopoly are condemned as strongly in the final as in the original draft. Competition, actual or potential, was the object of the Congressional solicitude.

But we do not think it necessary to resort to the reports of the Congressional Committee or to debates in Congress in order to reach a confident conclusion as to the application of this statute to the contract between the plaintiff and defendant. Section 3 reads as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement

or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The contract now before the court provides in the plainest possible language that the purchaser shall not "sell or permit to be sold * * * on its premises * * * any other make or pattern and not to sell Standard patterns except at label prices." In effect the plaintiff admits that the only way of escape from the condemnation of the statute is for the court to hold that this negative covenant may not "substantially lessen competition or tend to create a monopoly."

No such finding can be made. Observe at the outset that the condemnation of the statute runs * * * "where the effect of
194 * * * such negative covenant * * * "may be to substantially lessen competition or tend to create a monopoly." The language is "may be," not "is" or "will be."

In order to condemn the negative covenant, it is not necessary that the court should find that it will lessen competition or will tend to create a monopoly; it is enough to find that it may lessen competition or may tend to create a monopoly.

On this record we are constrained to find that this restriction may substantially lessen competition and may tend to create a monopoly. It already appears that out of some 52,000 pattern agencies in this country the plaintiff or a holding company controlling it and two other pattern companies control approximately two-fifths. The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combinations; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business.

We must consider this restriction in the light of the facts peculiar to the business to which the restraint is applied, to the conditions already achieved under such restraint, as well as the nature of the restraint and its effect, actual or probable. Viewing it thus, in the light of the surrounding circumstances, we are constrained to agree with the District Court that the negative covenant in this contract may lessen competition or may tend to create a monopoly,—or both,—and is therefore obnoxious to the Clayton Act.

See Chicago Board of Trade v. United States, 246 U. S. 231, 238.

To avoid possible misconception of this opinion, we add that we do not overlook that the contract in question also contains a stipulation to maintain resale prices. The validity of this provision is not

raised by the pleadings, nor has it been discussed by counsel.
195 Whether under the circumstances of this case such resale price stipulation is invalid, we do not decide.

Bauer v. O'Donnell, 229 U. S. 1;
Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373;
Ford Motor Co. v. Union Motor Sales Co., 244 Fed. 156;
Strauss v. Victor Talking Machine Co., 243 U. S. 490;
Motion Picture Co. v. Universal Film Co., 243 U. S. 502;
United States v. Kellogg Toasted Corn Flake Co., 222 Fed. 725, 728.
Boston Store v. American Graphophone Co., 246 U. S. 8.

Our decision that the negative covenant cannot be enforced is enough to dispose of this case as a suit in equity. The pleadings do not raise, and we have not undertaken to consider and determine the question of what rights, if any, the plaintiff may have, in some other action, to recover either for goods sold and delivered, or for damages for breach of the contract. Whether the invalid negative covenant and the resale price stipulation,—either or both,—taint the whole contract and all sales made in the course of the business contemplated by such contract, we do not decide. See

Continental Wall Paper Co. v. Voight, 212 U. S. 227;
Connolly v. Union Sewer Pipe Co., 184 U. S. 540;
Wilder v. Corn Products Co., 236 U. S. 169;
McMullen v. Hoffman, 174 U. S. 639;
Roselle v. Beckemeir, 134 Mo. 380;
Fishell v. Gray, 60 N. J. L. 5;
Rosenbaum v. U. S. Credit Co., 65 N. J. L. 255;
King v. King, 63 Ohio St. 363;
1 Parsons on Contracts, 9th Ed. p. 496;
Wall's Pollock on Contracts, p. 484 and cases and notes;
Pullman Car Co. v. Transportation Co., 171 U. S. 138, 151;
Harriman v. Northern Securities Co., 197 U. S. 244;
Bone v. Ekless, 5 H. & N. 924;
Thomas v. Richmond, 12 Wall., 349, 356;
Boylston Bottling Co. v. O'Neil, 121 Northeastern, 411, a decision by the Massachusetts Supreme Judicial Court on January 2, 1919.

The decree of the District Court is affirmed with costs.

196 BROWN, *J.*:

Full weight must be given to the final clause of Section 3 of the Clayton Act:—

"where the effect of such lease, sale, or contract for sale, or such condition, agreement, or understanding, may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

In determining the effect we must consider the thing upon which the effect is to be produced. This clause seems to require that the

interpretation and application of Section 3 of the Clayton Act should be according to the principles stated in the opinion of Mr. Justice Brandeis in Chicago Board of Trade v. United States, 246 U. S. 231, 238:—

"But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may depress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

To predict the consequences of the defendant's agreement not to sell or permit to be sold on its premises, during the term of the contract, any other make of patterns, it is necessary to consider the peculiarities of the particular business to which the contract relates. We must also consider that the restraint is upon the use of the premises of the defendant for a limited period. See 251 Fed. 559, 560. It is evident that a restriction of this character did not constitute an inducement to the defendant to enter into the contract for carrying a stock of the plaintiff's goods. It is also evident that so long as the defendant remained satisfied to carry only the single line of dress patterns that it had chosen, the agreement not to carry another
197 line of goods was of no practical effect. It is operative to exclude competitors only in those cases where a customer may desire to add a second stock, or to abandon his contract during its term. Of the exclusion of competitors which results from the fact that the wants of customers are supplied by the plaintiff, no complaint can be made.

The misapprehension as to the actual or probable effect of restrictions of this character as a means of introducing goods to the trade and of building up a monopoly was pointed out by the Supreme Court in United States v. United Shoe Mchry. Co., 247 U. S. 32, 66:—

"Besides, it is impossible to believe, and the court below refused to find, that the great business of the United Shoe Machinery Company has been built up by the coercion of its customers and that its machinery has been installed in most of the large factories of the country by the exercise of power, even that of patents. The installations could have had no other incentive than the excellence of the machines and the advantage of their use, the conditions imposed having ade-

quate compensation and not being offensive to the letter or the policy of the law;"

and by the court in United States v. United Shoe Mchry. Co. of N. J. et al., 222 Fed. 349, 414:—

"It is impossible to believe that defendants' equipment is in so many shoe factories for any other substantial reason than the merits of what they had had to offer. To say that this is due, in any substantial degree, to the fact that its leases run beyond the terms of patents, or because of the exclusive use, prohibitive, or cancellation clauses, rests largely, if not entirely, upon assumption. But that the business of these defendants rests upon the lease provisions objected to in such a substantial amount as to constitute any factor of independent force in securing or maintaining a monopoly does not appear."

This was said in connection with contracts of a duration as long as seventeen years, and applies with especial force to short-term contracts like that before us. It also was said in the opinion in that case (222 Fed. 407):—

"A business contract, like a statute, is not to be upset 'upon hypothetical and unreal possibilities if it would be good upon the facts as they are.' Pullman v. Knott, 235 U. S. 23."

198 In applying the statute it must be judicially determined what the effect may be. This judgment must be more than a mere feeling of "possibility" arising in ignorance of facts which, if known, would destroy that feeling. It must be based on knowledge and upon a reasonable belief that, in view of existing facts, there is a "dangerous probability."

In the present case there is no evidence that any competitor of the plaintiff had ever been excluded from competition in the city of Boston or elsewhere because of inability to procure customers or a store in which he might market his goods. If the defendant desired to defend upon the ground that this contract, by reason of its effect upon the trade, was illegal, it was incumbent upon it to allege and prove such facts as would enable the court to make a reasonable prediction of consequences. Ford Motor Co. v. Benjamin E. Boone, Inc., 244 Fed. 335, 342. No such defence is made by the answer.

The defendant sets up in its answer that the plaintiff is a combination in restraint of trade, and that it is seeking an injunction against the defendant for the purpose of preventing competition and to establish a monopoly. The answer that the plaintiff is an unlawful combination of course states no defence.

The facts before us were brought out principally in the direct testimony of the plaintiff and upon cross-examination. They tend to show that the ordinary purchaser from the plaintiff is required to maintain a considerable stock of dress patterns which soon go out of style, and have to be renewed by exchange, and that a single stock meets all the requirements of the ordinary dealer at retail. This being the case the exclusion of competitors would presumably result from the fact that the plaintiff's customers were supplied and did not

desire to duplicate their stocks, but preferred to concentrate their efforts on the goods of their choice, rather than from any agreement not to handle the goods of others. It also appears that there are but few stores which handle more than one line of dress patterns, and that in some cases special contracts are made permitting it.

From the history of this clause of the Clayton Act to its final form it is quite evident that Congress rejected various drafts which would make a contract of this character void upon its face, and that
199 the final clause was inserted to prevent the disturbance that might result to long established methods of business by an indiscriminate condemnation of a large body of existing contracts because of their verbal form, irrespective of their actual or probable effect, and in recognition of the fact that where there is an established monopoly competition cannot be instituted or maintained unless the new competitor in the field can make a contract with someone to handle only its own goods and not to handle the goods of a company already dominating the field; that if such contracts were to be condemned irrespective of the trade in which they were made this might lead to effective suppression of competition, by enabling an established monopoly to place its goods in the shop of every competitor.

I am of the opinion that this Court should not, upon this record and upon so incomplete a state of proofs, determine the invalidity of this contract. The question of the plaintiff's right, at the time of bringing his bill, to an injunction to restrain a breach of the negative agreement concerning the use of the premises, in spite of the authorities cited, is still very doubtful on principle.

The doctrine of Lumley v. Wagner 1 De G. M. & G. 604, has been much questioned. Lindley, L. J., said he looked upon Lumley v. Wagner "as an anomaly which it would be dangerous to extend." See Fry on Specific Performance, 5th Ed., Secs. 860, 861, 862. In Sections 857 and 858 the difficulties in distinguishing between express and implied negatives are discussed. So far as the negative agreement is not to do that which as a matter of fact is inconsistent with an affirmative and lawful agreement, it may be regarded as mere surplusage. It is only where the negative agreement goes beyond what is inconsistent with an affirmative and lawful agreement that it can be regarded as unreasonable. That a court of equity, while recognizing its inability to compel specific performance of a contract, should nevertheless, by injunction, put compulsion upon a defendant who is answerable at law for his breach of contract, may result merely in the imposition of a penalty; and penalties are not favored in equity. The defendant's agreement not to use its premises for the sale of the goods of others was to fortify the agreement to

200 "pay proper attention to the sale of plaintiff's patterns and to conserve the best interests of the agency at all times."

Ordinarily a party to a business contract for the purchase of goods may elect to break his contract and pay full damages. For a court of equity to put compulsion upon him by way of punishment for re-

fusing to perform the contract is beyond its powers; and to attempt coercion without power to make it effective is too doubtful an experiment. In view of the decision of the Supreme Court in Javierre v. Central Altagracia, 217 U. S. 502, it is doubtful if the Supreme Court will approve the extension of the doctrine of Lumley v. Wagner to a contract like that involved in the present case.

I am of the opinion that on the present record we cannot properly determine that the contract is invalid under the Clayton Act. The statute does not create a presumption that such contracts are inherently vicious, nor does it impose upon the plaintiff the burden of proving that the contracts are not illegal. The presumption is of legality, and the burden is upon him who asserts illegality. The application of the statute should be made only upon full proofs. The consequences of applying it otherwise are too serious to be disregarded. The power of Congress to enact this statute is based upon the power to regulate interstate commerce. It may make an interstate contract illegal by reason of the incorporation therein of conditions relating to commerce of a purely local character, not within the power of Congress to regulate when not associated with an interstate contract. It would seem to follow that we cannot separate from the interstate commerce features of the contract the features that relate to a business wholly local, and nullify those features only, since this is directly inconsistent with the theory that by virtue of their connection with an interstate commerce contract Congress, in the exercise of its power over interstate commerce, may provide that—

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale * * * on the condition," etc.

In view of the long continuance and wide extension of the method of doing business, through what the Supreme Court
201 & 202 in Wilcox & Gibbs Co. v. Ewing, 141 U. S. 627, regarded as agency contracts, and of the long established trade usage of describing such contracts as agency contracts, irrespective of the fact that the title to the goods may pass from vendor to vendee, there must be a large body of outstanding contracts which might be so completely nullified that no recovery can be had by the vendors for goods that they have furnished under such contracts. It was not the intent of Congress to afford to persons who desire to escape from their contracts technical and merely verbal grounds to excuse a breach of contract.

It should be remembered that contracts in usual form, containing no negative agreements, are means of establishing monopolies and suppressing competition quite as effective as contracts containing negative agreements. Whether the expression is positive or negative is largely a mere matter of form. The effective means of establishing a monopoly is to get contracts to purchase goods. This must precede any agreement restricting the sale of other goods. The restrictive agreements may or may not have an effect according to

the circumstances. Under some circumstances they may be an effective means for breaking a monopoly by instituting or maintaining competition. In the present case there is evidence that the largest competitor of the plaintiff is rapidly extending its business by affirmative contracts without restrictive conditions, and has a much more dominating position in the field than the present plaintiff. I can see no ground in the record for apprehension that anybody is likely to acquire a monopoly in the dress pattern business, in which, as the evidence shows, competition is very active.

I am unable to agree that this bill should be dismissed because the contract in question is unlawful under the Clayton Act. I concur in the result for the reason that I am of the opinion that the plaintiff, upon the filing of the bill, was not entitled to an injunction as a means of coercing the defendant to perform the principal contract to which the negative agreement was merely a subordinate and dependent provision, and for the reasons stated in our former opinion.

203 On May 2, 1918, this cause came on to be heard, and was fully heard by the court, Honorable Frederic Dodge and Honorable George H. Bingham, Circuit Judges, and Honorable Arthur L. Brown, District Judge, sitting.

Thereafter, to wit, on June 28, 1918, a per curiam opinion (page 171) was announced, and the following Decree was entered:

Decree.

June 28, 1918.

This case came on to be heard upon the transcript of record of the District Court of the United States for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now, to wit, June 28, 1918, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed, reserving the right to the appellant to make application to that court under Equity Rule 22 to transfer its suit to the law side of that court; and the appellee recovers costs in this court.

By the Court,

ARTHUR I. CHARRON,
Clerk.

Thereafter, to wit, on July 27, 1918, a petition for rehearing (page 175) was filed by the appellant, and on November 27, 1918, the following Order of Court was entered:

Order of Court.

November 27, 1918.

It is ordered that the petition for rehearing filed July 27, 1918, be, and the same hereby is, granted, and that the case be called for re-argument at the January session, 1919.

By the Court,

ARTHUR I. CHARRON,
Clerk.

Thereafter, to wit, on January 28, 1919, this case came on to be heard on reargument before Honorable George H. Bingham and Honorable George W. Anderson, Circuit Judges, and Honorable Arthur L. Brown, District Judge, and was fully heard by the court.

204 Thereafter, on June 28, 1919, the opinion of the court (page 187) was announced, an opinion by Brown, J. (page 196), was filed and the following Final Decree was entered:

Final Decree.

June 28, 1919.

This case came on to be heard on reargument upon the transcript of record of the District Court of the United States for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now, to wit, June 28, 1919, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed with costs.

By the Court,

ARTHUR I. CHARRON,
Clerk.

Thereafter, to wit, on July 14, 1919, the following Motion for Stay of Precept was filed by the appellant:

Motion for Stay of Precept.

[Filed July 14, 1919.]

The plaintiff being about to file a petition to the Supreme Court of the United States for a writ of certiorari moves that the issue of the mandate may be stayed.

By its Attorney,

ROBERT G. DODGE.

On the same day, to wit, July 14, 1919, the following Order of Court was entered:

Order of Court.

July 14, 1919.

Upon motion of the appellant setting forth that it proposes to file a petition in the Supreme Court for a writ of certiorari, it is ordered that the mandate in this case be, and the same hereby is, stayed until further order of this court upon the condition that said petition is duly filed and presented within the time prescribed by the rules and practice of the Supreme Court of the United States.

By the Court,

ARTHUR I. CHARRON,
Clerk.

205 *Clerk's Certificate.*

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 204, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including July 21, 1919, in the cause in said court numbered and entitled, No. 1343, The Standard Fashion Company, Plaintiff, Appellant, v. Magrane Houston Company, Defendant, Appellee.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twenty-first day of July, A. D. 1919.

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

206 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Standard Fashion Company is appellant, and Magrane Houston Company is appellee, No. 1343, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the District of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the
207 United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourteenth day of November, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

208 *Return on Writ of Certiorari.*

United States Circuit Court of Appeals for the First Circuit.

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return of this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued "that the certified transcript of the record herein on file in the office of the clerk of the Supreme Court of the United States * * * may be taken as a return by this court to the writ of certiorari issued by the Supreme Court of the United States in the said case."

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my hand and affix the seal of said court at Boston, in said First Circuit, this twenty-first day of November, A. D. 1919.

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

[Endorsed:] 552/27,307. File No. 27,307. Supreme Court of the United States, No. 552, October Term, 1919. The Standard Fashion Company vs. Magrane-Houston Company. Writ of Certiorari.

209 United States Circuit Court of Appeals for the First Circuit.

No. 1343.

STANDARD FASHION COMPANY, Appellant,

v.

MAGRANE-HOUSTON COMPANY, Appellee.

Stipulation.

(Filed November 21, 1919.)

It is hereby agreed that the certified transcript of the record herein on file in the office of the clerk of the Supreme Court of the United States in the above case and there numbered 552 (October Term

1919) upon the docket of said court may be taken as a return by this court to the writ of certiorari issued by the Supreme Court of the United States in the said case.

ROBERT G. DODGE,
Attorney for the Appellant.
JAMES W. SULLIVAN,
Attorney for the Appellee.

A true copy.
Attest.

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

210 [Endorsed:] File No. 27,307. Supreme Court U. S., October Term, 1919. Term No. 552. The Standard Fashion Company, Petitioner, vs. Magrane-Houston Company. Writ of certiorari and return. Filed Nov. 24, 1919.